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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

July 26, 1991

CENTENNIAL, A UTAH CORPORATION, JOHN A. DAHLSTROM AND ARNOLD C. WOOD, *Petitioners*,

v.

PLACER U.S., INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether the due process clause of the Fourteenth Amendment acts as a check on discretion of judges to award punitive damages?

2. Whether Nevada law as applied below fails to meet such standards of notice of the conduct for which punitive damages may be allowed as required by this Court in *Pacific Mutual Life Ins. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991)?

3. Whether the amount of punitive damages in this case was excessive, in violation of Centennial's due process right to be free of grossly excessive, disproportionate damages awards?

4. Whether the suit below, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein, entitling Centennial to constitutional protection as to the burden of proof of liability and damages?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CENTENNIAL, A UTAH CORPORATION, JOHN A. DAHLSTROM AND ARNOLD C. WOOD, *Petitioners*,

v.

PLACER U.S., INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

The Petitioner Centennial respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nevada, entered in the above-entitled proceeding on March 28, 1991. App. A *infra*, 1.

OPINIONS BELOW

The Amended Findings of Fact Conclusions of Law and Judgment of the Seventh District Court of the State of Nevada for White Pine County is unreported, App. B, *infra*. Ten copies of the exhibits to this ruling are lodged with the Clerk of the United States Supreme Court. The Ruling of the Seventh District Court of the State of Nevada for White Pine County on Defendant John A. Dahlstrom Edward R. Wagner et al., Motion

To Amend Judgment or in the Alternative for a New Trial is unreported, App. C, *infra*. The Findings of Fact Conclusions of Law and Judgment of the Seventh District Court of the State of Nevada for White Pine County is unreported, App. D, *infra*. Ten copies of the exhibits to this ruling are lodged with the Clerk of the United States Supreme Court. The Ruling of the Seventh District Court of the State of Nevada for White Pine County on Plaintiff's Second Motion For Partial Summary Judgment in not Reported App. E, *infra*. The Ruling of the Seventh District Court of the State of Nevada for White Pine County on Plaintiff's First Motion For Partial Summary Judgment in not Reported App. F, *infra*. The opinion of the Supreme Court of Nevada, App. A, *infra*, is reported as *Placer v. Centennial*, et al., No. 20758 (filed March 28, 1991) (to be reported at ___ P.2d ___ (1991)).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a) (1990).

The judgment of the Supreme Court of Nevada was entered on March 28, 1991. [App. A, *infra*, 1] A petition for rehearing was not filed, a application for stay was filed with the Nevada Supreme Court on June 10, 1991. No action has been taken by the Nevada Court as of the date of this filing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 of the United States Constitution provides in relevant part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. THE PARTIES[1]

Petitioners are Centennial, a Utah corporation, John A. Dahlstrom, and individual and Arnold C. Wood, an individual ("Centennial").

Respondent is Placer Dome U.S., Inc., a California corporation which is a wholly owned subsidiary of Placer Dome Mining, a Canadian Corporation ("Placer").

B. THE ACTION BELOW

Respondent's action against Centennial involved a suit seeking punitive damages for trespass on property owned by the United States.

1. The Complaint

This quiet title action was filed by Placer on February 4, 1985. Centennial was not named in Placer's initial complaint. (R. Vol. I, pgs. 1-15) which sought to quiet title to the locatable minerals in the ground covered by the unpatented Top 1 through 4 lode mining claims ("Top Claims") and certain other claims. Placer subsequently amended its complaint on October 30, 1986 joining Centennial and seeking damages for trespass. (R. Vol I, pgs. 32-80) Centennial filed a timely answer to these claims and filed a counterclaim alleging that Placer trespassed on the unpatented Top Top Top 1-4 mining claims ("Top Top Top

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[1] All parties to this case are named in the caption. Pursuant to the Rules of this Court, Applicant Centennial, a Utah corporation, has no parent company, no wholly owned subsidiary of affiliate.

Claims") which covered the Bald Mountain Mine and seeking actual and punitive damages. Centennial's counterclaim also alleged that the Top Top Top Claims were superior to Placer's claims and that Placer's trespass and mining of those claims caused Centennial damages in excess of $100,000,000. (R. Vol I, pgs. 83-100) The record before the Court shows that Placer removed ore valued at more than $69,600,000 from the Bald Mountain Mine between November 1, 1985 and December 31, 1988 and that the mine still contained 3,246,000 tons of ore estimated to contain 181,776 ozs. of gold.[2] (R. Vol II, Pgs. 289-290).

2. Motions to Dismiss

Placer filed two Motions for Partial Summary Judgment. The first motion, filed on July 28, 1987, was granted in part and denied in part. (App. F, *infra*; R. Vol. 4, pgs.73-77). The case was then set for trial. Placer made a motion to bifurcate the trial which was heard against Centennial's objection and granted by the court.

The court ordered the setting of two firm trial dates with the same jury. The first trial to decide the issue of claim validity and liability for trespass was scheduled for July 11, 1988. The second trial for issues as to the amount of damages by either party was scheduled to be held after the end of the first trial in the fall of 1988. (R. Vol IV, pgs 114-116).

On June 17 1988, less than thirty days before the trial on liability, Placer filed a Second Motion for Partial Summary Judgment ("Second Motion"). (R. Vol. 7 pgs. 1-19). The court

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[2] In its annual report (form 10-K) for December 31, 1988 filed with the U.S. Securities Exchange Commission, (R. Vol. 2, Pg 289). Placer reports that, since 1985, it has extracted 139,986 ounces of gold from the Bald Mountain Mine which was sold for $69,600,000 and that the mine still contains reserves of 3,246,000 tons of ore estimated to contain .056 ounces of gold per ton or 181,776 ounces of gold.

continued the trial and vacated the jury trial setting for July 11, 1988 while it considered the Second Motion.

The court granted the Second Motion on July 11, 1988 after the hearing with the following language:

> While it is true that all evidence favorable to the party against whom summary judgment is sought will be accepted as true, affirmative opposition must be set out in affidavit form specific facts, based upon the personal knowledge of the affiant, showing a genuine issue for trial. Lacking the same, plaintiff's Second Motion for Partial Summary Judgment be, and is granted. The remaining defenses asserted by defendant are determined to be meritless in view of the foregoing.

(App. E *infra*, p. E-1; R. Vol. V pgs. 262-263).

3. Denial of Certification for Appeal

The court denied Centennial's motion to certify its decision (on the second motion) for appeal pursuant to Nev. R. Civ. P. Rule 54(b) filed on August 5, 1988. (R. Vol. V, pgs. 264-270). The court then granted a motion to allow withdrawal of Centennial's counsel on August 22, 1988, and by order dated November 4, 1988 set a firm trial date for the damages portion of the case for April 17, 1989. (R. Vol. I, pgs. 127-129).

4. Motion for Continuance

Appellants' sought to obtain new counsel. However, to obtain new counsel, it was necessary for prospective counsel to review transcripts of the prior proceedings. Despite appellants' request for transcripts of the previous proceedings from the trial court, the court was unable to timely complete the transcripts due to the press of other court business until after the trial date.

Without the transcripts, appellants were unable to obtain counsel in time for the trial, and moved for a continuance, and to have the trial setting stricken. The court denied the motion for continuance and the motion to strike. A trial on damages without a jury was held on April 17, 1989 at which trial appellants did not appear.

Even though the appellants were not present at trial, the court entered its findings of fact and conclusions of law, and judgment on June 5, 1989. (App. D. *infra*; R. Vol. II, pgs. 130-165). The court, among other things, found that:

a. Placer's Top Claims were superior to Centennial's Top Top Top Claims; and

b. defendants had trespassed on such claims; and

c. the conduct of Defendants in their trespass was negligent, careless, deliberate, carried out in bad faith, done with malice towards the rights of Placer and with intent to be oppressive to Placer.

These findings were made despite the fact that no evidence of defendant's conduct was before the court when the court ruled on appellants' liability by granting Placer's motion for summary judgement. The court then awarded damages to Placer as follows:

a. for engineering and surveying work and helping with the prosecution of the action against Centennial approximately 570 hours of employees time at a cost to plaintiffs of $11,910.75.

b. attorney's fees and costs $175,087.19.

c. treble damages for trespass

d. punitive and exemplary damages $1,000,000.

On June 26, 1989, defendant Dahlstrom filed a Motion to Amend this judgment or in the alternative for a new trial (R. Vol. III, pgs. 571-574) on the following grounds:

a. the court erred in holding that defendant Dahlstrom is individually liable;

b. representations made at trial by Placer as to Dahlstrom's assets and earnings after April 18, 1986 were false and amount to misconduct by Placer;

c. the court erred in awarding attorney's fees;

d. the findings of fact are contrary to the evidence;

e. the court erred in awarding punitive damages;

f. the denial to Dahlstrom of due process by denying his motion for continuance and to strike the trail setting based on his inability to obtain counsel because he could not obtain transcripts of the two summary judgment hearings for review by prospective counsel before trial.

g. any claims against Dahlstrom were barred by the automatic stay provided by the U.S. Bankruptcy laws.

5. **Motion to Amend Judgment.**

On October 20, 1989 the court ruled on Dahlstrom's motion to amend the judgment or in the alternative for a new trial. The court directed Placer's counsel to prepare appropriate findings and conclusions and an order. (App. C, *infra*; R. Vol. III, pgs. 797-831).

On December 22, 1989, the court entered amended findings of fact, conclusions of law and judgment. (App. B *infra*; R. Vol. VI, pgs. 564-639). In its amended judgment, the court did not amend its ruling as to the superiority of Placer's Top Claims, the trespass, or Dahlstrom's individual liability. However, the court did amend its ruling on damages.

It allowed actual damages for 470 hours of lost employee time in the amount of $11,910.75. App. B,*infra*, p. B-36. The court then restated its finding on attorney's fees to hold that they were not awarded under N.R.S. 18.010(2), but were awarded because the defense was brought without reasonable grounds, resulting in attorney fees and costs in the amount of $175,087.91. App. B, *infra*, p. B-36. The court then adopted petitioners' arguments as to treble damages, concluding that Placer may not receive treble damages because they were not the result of removing ore from the mine. Finally, the court made a new finding that fraud and malice had been shown and that punitive damages of $1,000,000 should be awarded under N.R.S. 42.010. (replaced by N.R.S. 42.005)

The court further held that evidence of financial condition and vulnerability of plaintiff did not need to be considered in determining the amount of punitive damages to be awarded, App. B, *infra*, pgs. B-38, B-40, and that the vulnerability of the plaintiff need not be considered. App. B, *infra*, pgs. B-40, B-41.

6. Centennial's Appeal

Centennial appealed to the Nevada Supreme Court. The matter was briefed, and argued. Centennial raised its constitutional challenges to the award of punitive damages at every stage of this proceeding, in its opposition to motions for summary judgment, in its motion to amend the judgment, and vigorously advanced those issues on appeal, in its briefs, and at oral argument.

7. The Decision of the Nevada Supreme Court.

The Nevada Supreme Court filed its decision summarily affirming the judgment below without analysis, and rejecting Centennial's federal constitutional challenges to the punitive damages award on March 28, 1991. App. A, *infra*. Centennial Determined Not to File a Petition for Rehearing. The Petition for Certiorari followed.

C. REASONS FOR GRANTING THIS PETITION

The reasons presented herein were recently addressed in *Pacific Mutual v. Haslip*, 111 S. Ct. 1032. Subsequently this court granted certiori in a number of cases involving punitive damages. In these cases, the judgments were vacated and the cases remanded for further consideration in light of *Pacific Mutual*.[2]

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[3] *Fleming Landfill v. Garnes*, No. 90-1569 (filed June 28, 1991), *cert. granted* 1991 U.S. Lexis 3908; *Transamerica Accidental Life Ins. Co. v. Koire*, No. 90-1611 (filed June, 3 1991), *cert. granted* 1991 Lexis 3220, 59 U.S.L.W. 3809; *Southern Life and Health Insurance Co. v. Turner*, 571 So. 2d 1015 (Ala 1990), *cert. granted*, 59 U.S.L.W. 3741 (Apr. 29, 1991) (No. 90-1399); *AMCA International Finance Co. v. Hilgedick*, 1990 Cal. LEXIS 5184 (Cal. Nov. 15 1990), *cert. granted*, 59 U.S.L.W. 3723 (Apr. 22, 1991) (No. 90-1369); *Intercontinental Life Ins. Co. v. Lindblom*, No. 90-1284 (filed March, 15 1991) *cert. granted* 59 U.S.L.W. 3701; *Clayton Brokerage Co. v. Jordan*, 861 F.2d 172 (8th Cir. 1988)(Federal jury awarded $400,000 punitive and $7,932 compensatory for commodities fraud), *cert. granted*, 59 U.S.L.W. 3635 (March 18, 1991)(No. 88-1483); *Reserve Life Insurance Co. v. Eichenseer*, 682 F. Supp. 1355 (ND Miss. 1988)(Judge awarded $500,000 punitive for failure to pay health claims.), *cert. granted*, 59 U.S.L.W. 3635 (March 18, 1991) (No. 89-1303); *Hospital Authority of Gwinnett County v. Jones*, 386 S.E.2d 120 (Ga 1989)(Georgia jury awarded $1.3 million punitive and $5,001 compensatory for failure to send burn victim to proper hospital), *cert. granted*, 59 U.S.L.W. 3635 (March 18, 1991)(No. 89-1315).; *Church of Scientology of California v. Wollersheim*, 212 Cal. App. 3d 872, 260 Cal Rptr 331 (2nd Dist. 1989)(California jury awarded $2 million punitive damages and $500,000 compensatory for coercing participation in religious practices), *cert. granted*, 59 U.S.L.W. 3635 (March 18,

This case is typical of the explosion of punitive damages claims and awards which are escalating in both number and size. As shown by the award against Centennial in this case, trial judges and appellate courts have free and untrammelled discretion regarding whether and how much to punish. In this case, Centennial was punished for trespassing on mining claims on public land when these claims were determined by summary judgment to be inferior to Placer's.

This, however, is not a typical David versus Goliath case where a small entity recovers large damages from a large company. In this case, the recipient of the award is Goliath, a large foreign corporation with more than $90C million in net worth operating through a U.S. subsidiary to remove minerals from U.S. federal land. The entity being punished is a small Utah company and its predecessor in interest is a surveyor who located the competing claims. The agent of the Utah company who was declared bankrupt before being joined by Placer in its quiet title action is also a victim of the Nevada courts unconstitutional imposition of punitive damages. This case is also very different factually from *Pacific Mutual.* Unlike *Pacific Mutual,* Centennial did not have "the full panoply" of Nevada's procedural protections. Here there was no trial on the question

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1991)(No. 89-1361); *Int'l Soc'y for Krishna Consciousness of California v. George*, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (4th Dist. 1989) (California jury awarded $2.5 million punitive and $485,000 compensatory for brain washing a 14 year old girl and hiding her from her parents. Reduced from $32.6 million punitive by trial and appeals court judges), *cert. granted*, 59 U.S.L.W. 3635 (U.S. March 18, 1991)(No. 89-1399); *Pacific Lighting Corp. v. MGW Inc.*, (California jury awarded $2 million punitive and $558,000 compensatory damages for failure to pay broker commission), *cert. granted*, 59 U.S.L.W. 3635 (March 18, 1991) (No. 90-626); *Portec, Inc. v. The Post Office*, 913 F.2d 802 (10th Cir. 1990), (Federal jury in Colorado awarded $500,000 in punitive damages and $79,519 in compensatory damages for misappropriation of trade secrets. The award was reduced by the U.S. 10th Cir. from $1,500,000 in punitive damages) *cert. granted*, 59 U.S.L.W. 3635 (March 18, 1991).

of liability, no jury or jury instruction, no post verdict hearing to insure meaningful and adequate review, and there was no evidence of application of standards by the appellate court to insure reasonableness.

1. **Nevada law as applied in this case fails to meet the constitutional standard required by Pacific Mutual v. Haslip, 111 S. Ct. 1032, and therefore violates the 14th Amendment of the U.S. Constitution.**

In this case the trial court determined liability based on summary judgment and imposed compensatory damages of $11,910 for 570 hours of employees time spent on engineering and surveying work and helping with the defense of title to certain unpatented mining claims. In addition, the court awarded attorney's fees contrary to Nevada statutes and case law[4], which are in the nature of punitive damages because they are awarded at the discretion of the court for failure to "maintain a proper defense." App B, *infra*, p. B-35. In addition, an award of $1,000,000 in punitive damages was made, which is approximately 84 times the actual damages not including the improperly awarded attorney's fees.

In 1988, Nevada passed a statute limiting punitive damages to $300,000 where compensatory damages are under $100,000, and limiting punitive damages to three times the award if compensatory damages are more than $100,000. Although this statute became effective May 31, 1988, six days before the trial courts first decision in this case, the trial court and the Nevada Supreme Court chose to ignore it.[5]

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[4] Nev. Rev. Stat. Ann. 18.010 and Lebritz v. Circus Circus Hotels, Inc., 101 Nev 109, 693 P.2d 1261 (1985).

[5] Nev. Rev. Stat. Ann § 42.005 states:

Exemplary and punitive damages: In general; limitations on amount of award; determination in subsequent proceeding.

1. In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $ 100,000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $ 100,000.

2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:

(a) A manufacturer, distributor or seller of a defective product;
(b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;
(c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;
(d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or
(e) A person for defamation.

3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made

The trial court also ignored the Nevada case law limiting punitive damages which provides that,

> [i]n arriving at the ultimate judgment of where excessiveness begins, courts can legitimately take into account any circumstances which relate to the limits of punishment an deterrence that can be properly imposed in a given case. Relevant circumstances include such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind.
>
> As can be readily understood, these factors are largely common sense considerations which relate in everyday terms to the judgment of what goes beyond fair and proportionate punishment and reasonable deterrence under the circumstances. The ultimate question remains the same: Whether the fact finder has clearly exceeded the reasonable bounds of punishment due and justifiable deterrence as related to the acts complained of.

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by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

4. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed. (1989, ch. 218, § 2, p. 486.)

Ace Truck and Equipment Rentals, Inc. et al. v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987).

While the Nevada statues and case law provide some restrictions on awards of punitive damages, they were not followed in this case, and the Nevada Supreme Court refused to remand the case or provide an opinion on appellate review indicating that any standard, statutory or in case law, had been applied.

In a more recent decision by the Nevada Supreme Court, reducing a $22.5 million punitive damages award to $5 million, *Pacific Mutual*, was cited by the Nevada Supreme Court with this comment:

> ... [Appellant] raises a constitutional argument regarding punitive damages, but we reject this argument because the availability of punitive damages is accepted as settled law by nearly all state and federal courts. *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 59 U.S.L.W. 4157 (March 4, 1991). Our court has stated that punitive damages provide a benefit to society by punishing undesirable conduct not punishable by the criminal law. *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987).

Republic Insurance Co. v. Hires, No. 19426, slip op., 1991 Nev. Lexis 51 (filed May 2, 1991).

It is clear from this statement, that the Nevada Supreme Court does not feel constrained to apply the balancing factors contained in *Pacific Mutual v. Haslip*, 111 S. Ct. 1032 (1991), in awarding punitive damages.

The standard of review for punitive damages awards developed by this Court in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S.

813, 828-829 (1986) and *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) and more recently in *Pacific Mutual v. Haslip*, 111 S. Ct. 1032 (1991), have not been acted upon by the Nevada Supreme Court. While the Nevada legislature passed a punitive damages limitation statute effective May 31, 1988, the Nevada Supreme Court in this case ignored the statute and also refused to apply the balancing test previously set forth by the Nevada Supreme Court in *Ace Truck v. Kahn*, 746 P.2d 132.

The need for the United States Supreme Court to intervene in Nevada is manifest by this apparent lack of concern for constitutional standards. What controls are put on the availability of punitive damages by the Nevada legislature one day may be removed the next. The highest appellate court in the state may elect to apply or ignore the statute and prior precedents. Although a standard was established by the Nevada legislature, and by Nevada case law, the trial court and the Nevada Supreme Court, in this case, failed to apply the standard. Therefore, this Court should require that federal constitutional guarantees are applied in Nevada by reversing and remanding this case.

2. **Nevada law, as here applied, and punitive damages doctrine generally, violates due process by allowing the judge to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.**

Punitive damages are clearly punishment. As such, they must be awarded under constitutionally adequate standards to guide juries and reviewing court as to when they should be imposed, and as to how much is appropriate to punish and deter. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Banker's Life & Casualty Co. v. Crenshaw*,

486 U.S. 71 (1988) (concurring opinion); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. , 109 S.Ct. 2909 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991). In the *Banker's Life & Casualty Co.*, and *Browning-Ferris* cases, above, the Court declined to rule on Due Process challenges to punitive damages because the issues were "not pressed or passed upon below." Justice O'Connor, however, in *Banker's Life, supra*, in a concurring opinion joined by Justice Scalia, while concluding the issues should not be reached in that case, stated:

> Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause . . .
>
> Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial'....
>
> ... This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

Banker's Life & Casualty Co., 486 U.S. 71 at pages 87-88 (1988).

In *Browning-Ferris, supra*, Justice Brennan, joined by Justice Marshall, stated, at 109 S.Ct. 2909 at page 2923:

"I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."

The jury (or trial court) process which appears to trouble the Court was described in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381 (1984), in which the Court stated, at page 388:

> *The process through which a fact finder finds punitive damages is somewhat contradictory.* On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter.

(Emphasis added.)

This is exactly the arbitrary and discriminatory enforcement condemned by Due Process. Because the decision of whether or not to award punitive damages is committed to the moral discretion of each judge, imposition of such punishment is necessarily arbitrary and unpredictable. *Devlin* recognized that what may outrage one jury, and lead it to award substantial punitive damages, may leave another jury unmoved.

The constitutional invalidity of this type of situation was described by this Court in *Coates v. City of Cincinnati* 402 U.S. 611 (1971) as follows at page 614:

"Many types of behavior can be restricted or even prohibited but not constitutionally, 'through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a [law enforcement officer] is annoyed.'" *See also, Jenkins v. Werger*, 564 F. Supp. 806, 808 (D. Wyo. 1983).

The rights of other defendants have been violated in the past and are at risk in the future. Guidance from this Court is needed.

3. **The amount of the award of punitive damages in this case was excessive, in violation of Centennial's due process right to be free of grossly excessive, disproportionate damages awards.**

The compensatory damages awarded in this case were $11,910 for 570 hours of employees time spent on engineering and surveying work and helping with the defense of title to certain unpatented mining claims. Attorney's fees were also awarded contrary to Nevada law and therefore must be considered part of the punitive award. In addition, the trial court awarded $1,000,000 as punitive damages. It is submitted that this award amounting to $1,186,997 was excessive under the due process standards of *Pacific Mutual v. Haslip*, 111 S. Ct. 1032. In *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, U.S. , 109 S. Ct. 2909 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating, at page 2923:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable,' *St. Louis,*

> *I.M. & S.R. Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 522-23 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

Because punitive damages are punishment sanctions, not dischargeable in bankruptcy and deductible for tax purposes, it is submitted that Due Process further constrains excessive awards. In this case the Nevada legislature had passed a statute limiting awards, but both the trial court and the Nevada Supreme Court chose to ignore it. *See* fn. 4, *supra*.

A number of decisions of this Court have addressed the issue of when nominally civil cases are penal in nature, including *U.S. Ex Rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Trop v. Dulles*, 356 U.S. 86 (1958); and *U.S. v. Halper*, 490 U.S. , 109 S.Ct. 1892 (1989).

As applied to punitive damages awards, these cases suggest that (i) if the purpose of the sanctions is punishment, certain constitutional protections would apply under the Due Process Clause of the Fourteenth Amendment, (ii) no remedial purpose can be found where the amount of the sanctions exceeds the amount which can fairly be determined to be remedial as compensation for actual loss, and (iii) in government actions, under federal statutes, double damages do not constitute punishment where the aggregate amount thereof does not exceed such compensation, broadly viewed.

The general rule regarding whether a punishment sanction is excessive appears to be that punishment must not be grossly out of proportion to the severity of the offense *Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*, 428 U.S. 153 (1976). In

Solem v. Helm, 463 U.S. 277 (1983), this Court sought to set some objective criteria for determining whether a sanction was disproportionate.

It is submitted that the excessiveness of the award in this case, $11,910 in actual versus $1,175,087 in punitive damages, and the number of multimillion dollar awards being rendered shows the necessity for this Court to make a broad review of punitive damages doctrine on Due Process grounds, and require that they bear a necessary relationship to actual harm caused.

4. The Suit Below, Although Nominally Civil, Must be Considered Criminal in Nature as to the Punitive Damages Awarded Therein, Entitling Centennial to Protection Under the Fourteenth Amendment to the United States Constitution.

a. The Controlling Test Established by the United States Supreme Court.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court established the test and analytic process to be applied to determine when the full protections guaranteed by the Constitution to criminal defendants must be given to defendants in a nominally civil action. In *Mendoza-Martinez*, a defendant had been denaturalized under Section 401(j) of the Nationality Action of 1940, for leaving and remaining outside of the United States to evade or avoid military service. The court held the statute to be invalid because it deprived the defendant of citizenship, as punishment, without the safeguards guaranteed by the constitution.

> In reaching this conclusion, this Court stated, at page 167:
> ". . . [F]orfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, . . . If the sanction these sections

> impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further."

The court in *Mendoza-Martinez* thereby flatly stated the position that if a sanction is punishment, the procedural safeguards of the constitution must be applied.

This appears to be a single, overriding standard for determining the applicability of criminal procedural safeguards under the constitution.

The criteria for determining whether or not the sanction is punishment are (i) is the announced purpose to punish, as in *Mendoza-Martinez*, or (ii) if the purpose is unstated or stated to be a civil remedy, do other factors (enumerated in *Mendoza-Martinez*) show that a non-punishment purpose can be assigned which is not overridden by the punishment impact of the sanction. This Court reached a similar result in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) over the assesment of costs by the jury under a state criminal statute. This Court struck down the state criminal statute. *Id.* at 401. The basis of this ruling was that the law was void for vagueness. *See Kollender v. Lawson*, 461 U.S. 352, 355 (1983).

b. In Nevada, Punitive Damages Are Expressly Imposed for Punishment and Deterrence and Therefore Meet the Mendoza-Martinez Test.

Punitive damages in Nevada, as a matter of common law of the state, are authorized in various categories of cases, and may be recovered by a plaintiff to punish the defendant and deter future similar conduct. *Ace Truck v. Kahn*, 746 P.2d 132; *Republic Insurance v. Hires*, 1991 Nev. Lexis 51 (May 2, 1991).

The United States Supreme Court, in *Bell v. Wolfish*, 441 U.S. 520 (1979), stated at page 589, n.20:

"Retribution and deterrence are not legitimate non-punitive governmental objectives."

c. **The Fact That Punitive Damages Are Sought in These Cases by Private Plaintiffs, Rather Than the Government, Does Not Prevent the Actions from Being Deemed Criminal in Nature.**

Plaintiffs in these cases act as private attorneys general in seeking punitive damages, the award of which is not a personal right, but rather, is a public interest in punishment and deterrence. *See, In Re Paris Air Crash*, 622 F.2d 1315, 1319-1320 (9th Cir. 1980), *cert. denied*, 449 U.S. 926 (1980). The involvement of the states in imposing punishment through punitive damages is clear. It is submitted that a state cannot evade according constitutional protections in inflicting punishment and retribution by providing that the punishment be imposed by a private attorney general. Therefore, the criminal proceeding protections must be accorded through the Due Process Clause of the Fourteenth Amendment. See in this regard, *United States Ex. Rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the Court considered whether or not a sanction in a case having a private party plaintiff was in fact a criminal case. While finding that the purpose of the sanction was not punishment, and therefore that the incidents of a criminal trial were not required, the discussion and analysis of the Court assumed that if the purpose were punishment, such incidents would have been required.

In this case, Centennial was denied a beyond a reasonable doubt burden of proof. *In Re Winship*, 397 U.S. 358, 364 (1970). The trial court decided the matter of liability by summary judgment. Even though a jury was demanded, none was given on the question of liability, and the amount of damages to be awarded was decided by the judge without a jury.

Again, the whole matter of burden of proof liability for punitive damages as well as the burden of showing the amount to be awarded is an area in which guidance from this Court is needed to establish the procedural safeguards to which defendants are entitled in punitive damages actions.

5. The Constitutional Defects in the Award of Punitive Damages Against Centennial in this case Were Not Cured by Judicial Review and the Potential for a Remittitur.

The Nevada Supreme Court simply dismissed Centennial's appeal without comment, even though the factors for determining punitive damages enumerated by the Nevada Supreme Court in prior decisions were not followed by the trial court. The factors listed in *Ace Truck v. Kahn*, 746 P.2d 132 (1987), are:

a. Financial position of the defendant. The trial court specifically held that no evidence of financial position was before it. App. B, *infra*, p. B-40.

b. Culpability and blameworthiness of tortfeasor.

c. Vulnerability and injury suffered by the offended party. The record before the court showed the net worth of Placer to be in excess of $900 million. R Vol 2 P 346. The trial court held that the vulnerability of Placer need not be considered. App. B *infra*, p. B-40.

d. The extent to which punished conduct offends the public sense of justice and propriety.

e. The means which are judged necessary to deter future misconduct of this kind.

Factors a and c above were clearly not considered by the judge. The remaining factors are largely unreviewable, and merely transfer discretion to the reviewing court. These factors

amount to no more than the gentle test of excessiveness. At most, use of the language of these criteria merely disguise the true basis of the court's decisions, which are subjective value judgments.

In this case, the trial court had no evidence of financial position of defendant before it, and the record shows that Placer was not vulnerable to injury by Centennial's actions in that Placer had more than $900 million in net worth. The trial court stated that it did not consider Placer's vulnerability. App. B *infra*, p. B-40.

It is submitted that judicial review does not and cannot cure the constitutional defects in the punitive damages award in this case. A procedure for review of a decision made under an unconstitutional law does not and cannot cure the unconstitutionality of the law. *See Furman v. Georgia*, 408 U.S. 238 (1972); *cf. Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6, 7-11 (1970).

Unlike the appellate review process in criminal matters, in punitive damages cases the appellate process itself lacks clear and consistent standards.This fact creates a risk of its own rather than curing the constitutional deficiencies found at the trial stage. In *2-D's Logging, Inc. v. Weyerhauser Co.*, 632 P.2d 1319 (Or. 1981), the appellate court made note of this problem, stating at page 1326:

> "Punitive damages doctrines have resulted in a perplexing and contorted mode of judicial review . . . which, in reality, is an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts. . . . At least in cases where there is no specific statutory authorization for their award, the imposition of punitive damages involves a policy or value judgment."

It is submitted that under the three-part test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the provision for remittitur by reviewing trial and appellate courts does not satisfy the requirements of due process for adequate limits on discretion.

The concern expressed by this Court, that there is a lack of objective standards limiting the imposition of punishment, and courts are left free to render awards without any necessary relationship to actual harm, cannot be met by the generalized, subjective and highly judgmental factors suggested by the Nevada Supreme Court. This is particularly true when there is no information before the court on one of the factors, and the court determines that another factor need not be considered.

D. CONCLUSION

Punitive damages law, as presently applied in Nevada, is overwhelmingly lacking in fundamental fairness. The law gives no fair notice of prohibited conduct because of the vague and largely contentless criteria upon which the awards are founded. Trier of fact deliberate with no meaningful standards to guide them as to the amount of punitive damages awardable. This unbridled discretion leads to arbitrary and unpredictable awards.

Under the judicial precedents in Nevada the judge was left free (i) to give free reign to biases and prejudices and to punish selectively; (ii) to allow others "guilty" of equally "reprehensible" conduct to go unpunished; (iii) to punish unpopular and target defendants, and; (iv) to render awards with no necessary relationship to actual harm caused. Judicial review, in the absence of objective limits, merely transfers discretion to the courts. This conclusion is further aggravated by the court's failure in this case to follow statutory limitations passed by the legislature.

The unpredictability of the outcome of any punitive damages case submitted to a trier of fact has led to actions which are in terrorem and extortionate in nature.

This situation requires remedy by this Court. It is submitted that Centennial's Petition should be granted.

July 23, 1991

Respectfully submitted,



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Attorney for Petitioners

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEVADA

JOHN A. DAHLSTROM, ARNOLD C. WOOD, and CENTENNIAL, INC.,

Appellants,

No. 20758

V.

PLACER DOME, U.S., INC.,

Respondent.

ORDER DISMISSING APPEAL

This is an appeal from a district court judgment finding appellants liable for trespass and slander of title, and awarding compensatory and punitive damages in favor of respondent. After reviewing the record, the briefs, and hearing oral argument, we conclude that appellants' claims are without merit. Accordingly, we hereby

ORDER this appeal dismissed.

/s/ Mowbray C.J.
Mowbray

/s/ Springer J.
Springer

/s/ Rose J.
Rose

/s/ Steffen J.
Steffen

/s/ Young J.
Young

APPENDIX B

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WHITE PINE

PLACER U.S. INC., a California
corporation, (formerly known
as Placer Amex, Inc.),

Plaintiff,

No. 13022

V.

EDWARD R.WAGNER, et al.,

Defendants.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

CASE PROCEEDINGS

This quiet title action was filed by Placer U.S. Inc. (the name of which is now Placer Dome U.S. Inc., and is hereinafter referred to as "Placer") on February 4, 1985. The action seeks to quiet title to the locatable minerals in the ground covered by the unpatented Top 1 through 4 lode mining claims as well as other unpatented mining claims owned by Placer, all of which are identified in Exhibit A attached to this Judgment (the "Top Claims"). In the First Amended Complaint, Placer also sought compensation for damages resulting from the trespass and slander of Placer's title to said minerals and mining claims committed by Defendants Centennial, Inc. ("Centennial"), Action Mining Company Inc. ("Action") , John A. Dahlstrom ("Dahlstrom") and Arnold C. Wood ("Wood") (collectively said Defendants are referred to as the 1985 Defendants" because that is the year in which their mining claims were staked). The First

Amended Complaint also sought an award of punitive damages against the 1985 Defendants. Centennial filed a counterclaim alleging that Placer has mined and continues to wrongfully mine the Bald Mountain Mine, causing Centennial damages in excess of $100,000,000.

First Motion For Partial Summary Judgment. On July 28, 1987, Placer filed a motion for partial summary judgment on the issues of the validity of the Top Claims and Placer's title to the ground at issue, preserving the issues of damages for a subsequent hearing. The First Motion was supported by 41 exhibits. The 1985 Defendants opposed the First Motion on the grounds that certain claims located in 1940, known as the Pioneer mining claims, mining claims were still valid at the time of location of the Top Claims on May 22, 1974 and thereafter, and as a result, the Top Claims were invalid. The 1985 Defendants did not offer any evidence in support of their opposition. The 1985 Defendants claimed that the Pioneer Claims were valid until Placer, which had obtained a quitclaim deed to the Pioneer Claims from other defendants now dismissed from this action, recorded a notice of abandonment of the Pioneer Claims on May 9, 1985. The notice of abandonment stated that the Pioneer Claims had been abandoned sometime prior to May 22, 1974. The 1985 Defendants argued that, because the Pioneer Claims were valid until May, 1985, the ground covered by them became open to location upon abandonment in 1985, and therefore the Top Top Top Claims ("Top Top Top Claims") located by Wood and Action on August 26, 1985 held title to the Bald Mountain Mine. After a hearing, the Court determined that, while Placer's Top Claims were valid on paper, there remained a genuine issue of material fact as to whether the Pioneer Claims were still valid at the time of location of the Top Claims. Accordingly, the First Motion was denied on December 23, 1987.

Proceedings Following Denial Of First Motion. After denial of the First Motion, Placer moved for a bifurcated trial to limit Defendants' right to discover propriety and confidential

information concerning the exploration, development, and mining of Placer's mine on the Top Claims (the "Bald Mountain Mine"). After a hearing on the motion, this Court determined that such information pertained only to damages and not the determination of title to the ground at issue. At the hearing, the Court also determined the 1985 Defendants were not entitled to the discovery of such information until such time as they were able to show that the Top Top Top Claims were superior to Placer's Top Claims. Accordingly, this action was bifurcated for trial, with the issues of claim validity and the 1985 Defendants' liability for trespass upon and slander of title to the Top Claims scheduled for the first trial and any issues as to damages incurred by Placer or the 1985 Defendants scheduled for a second trial. on demand of the 1985 Defendants, after opposition by Placer, the matter was set for trial by jury, the first trial to commence on July 11, 1988
and the second trial to follow in the Fall of 1988.

Second Motion For Summary Judgment. Prior to the first trial, Placer filed its Second Motion for Summary Judgment ("Second Motion"). The Second Motion requested that the Court summarily determine that the 1985 Defendants' Top Top Top Claims were invalid and that the 1985 Defendants had trespassed upon and slandered the title to Placer's Top Claims. In support of the Second Motion, Placer offered exhibits in addition to the exhibits supporting the First Motion, including the depositions of Jack Marsh and Robert Hunsaker. The 1985 Defendants opposed the Second Motion on two primary grounds: first, that the Pioneer Claims were still valid at the time Placer's Top Claims were located on May 22, 1974; second, the 1985 Defendants had not had the opportunity to complete their discovery. The 1985 Defendants did not offer any evidence in support of their opposition. As to the issue of discovery, the Court determined that substantial discovery had been conducted during the twenty months preceding the filing of the Second Motion, and that none of the discovery which the 1985 Defendants claimed they were missing had to do with the issues of title to the Bald Mountain Mine; rather, the discovery sought

by the 1985 Defendants pertained to the determination of damages. Placer's exhibits submitted in support of the Second Motion demonstrated by overwhelming, clear and convincing evidence that the Pioneer Claims had been abandoned prior to July 1, 1951, that Placer's Top Claims were valid, and that the 1985 Defendants' Top Top Top Claims were invalid. As a result, the Court granted Placer's Second Motion for Partial Summary Judgment on July 14, 1988.

Proceedings Subsequent To The Second Motion. On August 2, 1988, Placer served the 1985 Defendants with discovery requests pertaining to the financial positions and other related matters of the 1985 Defendants. On August 22, 1988, pursuant to a motion opposed only by Placer, this Court entered an order permitting John Muije, counsel for the 1985 Defendants, to withdraw as counsel of record. The 1985 Defendants did not timely respond to Placer's discovery requests, with the result that the Court entered an order on November 14, 1988 compelling the 1985 Defendants to respond to that discovery.

Placer had applied on July 26, 1988 for an early trial date on the damage portion of this action, but because the-1985 Defendants were then without counsel and were subject to an order compelling discovery, the Court did not believe an early trial date was appropriate. on November 1, 1988, the court entered an order setting the damage portion of this action for jury trial commencing on April 17, 1989.

On December 30, 1988, Placer filed a motion for sanctions based upon the 1985 Defendants' failure to provide the requested regarding their respective financial positions. The 1985 Defendants did not oppose the motion for sanctions, and on April 6, 1989 the Court granted the motion, withholding relief to the time of trial to determine the extent of prejudice to Placer.

On April 3, 1989, Dahlstrom and Centennial filed motions to continue the scheduled trial of April 17, 1989 on the grounds

that (1) Dahlstrom was subject to Chapter 11 bankruptcy proceedings before the Bankruptcy Court of the United States District Court for the District of Utah in Salt Lake City, Utah, and (2) the 1985 Defendants had been unable to secure copies of the transcripts of the two summary judgment hearings which he claimed were needed to enable him and the other 1985 Defendants to secure new counsel. Placer opposed the motion to continue. On April 14, 1989, Dahlstrom filed a motion to strike the trial setting and for leave to file a motion to disqualify the presiding judge. Twenty minutes before the jury trial was to commence on April 17, Wood and Action filed a near-duplicate of Dahlstrom's motion to strike and for leave to disqualify the presiding judge. Placer opposed these motions.

During a recess taken between 10:15 and 11:00 a.m. on the scheduled opening day of trial, the Court held a hearing on all of the 1985 Defendants' pending motions. As noted below, the 1985 Defendants failed to appear for trial and were not present at the hearing. Dahlstrom's motion to continue and the 1985 Defendants' motions to strike the trial setting and for leave to file a motion to disqualify the presiding judge were denied for the reasons set forth in the order entered at the end of the hearing.

The Damage Trial. None of the 1985 Defendants appeared for the jury trial on April 17, 1989. Shortly after 10:00 a.m., the Court excused the jury venire panel until 11:00 a.m. on the morning of the trial to allow the 1985 Defendants the opportunity to appear in the event some unforeseeable event had prevented them from timely appearing for trial or otherwise notifying the Court.

At 11:00 a.m. on April 17, the proceedings were reconvened and the 1985 Defendants still had not appeared or contacted the Court with respect to their absence. Because the jury venire had appeared only because of the 1985 Defendants' demand for a jury, and because Placer did not object to the dismissal of the jury, the Court dismissed the jury venire and

ordered that the damage trial would commence at 1:15 p.m. to be heard by the Court.

At the damage portion of the trial, the Court received into evidence 78 exhibits offered on behalf of Placer, together with the testimony of Richard W. Harris, David Parker, David S. Smith, and, by publication of deposition, Arnold C. Wood. The Court had previously received into evidence in connection-with the First Motion and Second Motion the deposition testimony of Defendant Wood, Jack Boundy, Defendant Dahlstrom, Jack Marsh, and Robert Hunsaker. Based upon that evidence, none of which was objected to by Placer or the 1985 Defendants, the Court made findings of fact and conclusions of law and entered judgment against the 1985 Defendants on June 7, 1989.

Amended Judgment Proceedings. Notice of entry of the judgment was entered on June 20 1989. Within the time allowed by the Nevada Rules of civil Procedure, Defendant John A. Dahlstrom, Pro Se, filed a motion to amend the judgment or in the alternative a motion for a new trial. Dahlstrom's motions were opposed by Placer and the matter was scheduled for hearing. On September 21, 1989, Dahlstrom and Placer appeared in open court and Dahlstrom's motions were heard by the Court. on October 20, 1989, the Court entered its Ruling on Dahlstrom's motions, which Ruling is adopted herein by this reference. The Ruling modified the judgment entered on June 20, 1989 by eliminating from that judgment the trebling of the compensatory damages. Based upon the evidence described above and presented by the parties with respect to Dahlstrom's motions to amend the judgment or for a new trial, the Court makes the following amended findings of fact and conclusions of law and enters the following amended judgment.

FINDINGS OF FACT

1. **Dahlstrom's Bankruptcy**. Dahlstrom's motions are based subject to Chapter 11 partially on the fact that Dahlstrom was proceedings under the federal Bankruptcy Act at the time he

was served with the First Amended Complaint in this matter. Dahlstrom's motions appear to allege that this case could not proceed against him because of his bankruptcy proceedings. At the April 17, 1989 hearing, it was established by competent evidence that the commencement of Dahlstrom's bankruptcy proceedings predated Dahlstrom's conduct which created his liability in this action. Dahlstrom has since not presented any evidence contrary to these established facts.

The evidence before the Court shows that, at the time Dahlstrom was served in the above-entitled action on October 31, 1986, Placer did not believe that any of Dahlstrom's actions or conduct giving rise to his liability in the above-entitled action occurred prior to the filing of his bankruptcy petition. During Dahlstrom's deposition on December 12, 1986 (Exhibit 6, Placer's First Motion for Partial Summary Judgment), Dahlstrom did not provide any information which would indicate that his involvement in this matter predated the filing of his bankruptcy petition. Dahlstrom testified that he had not physically been on Placer's Top claims prior to May, 1986 and that he did not have any interest in the ownership of the Top Top Top claims prior to their acquisition by Centennial, Inc. on April 23, 1986. Therefore, Dahlstrom had not been involved in the trespass by the Top Top Top claim owners on Placer's Top claims prior to April 23, 1986, five days after the filing of Dahlstrom's bankruptcy petition. Moreover, because the charter of Centennial, Inc. was revoked at the time Dahlstrom caused Centennial, Inc. to acquire title to the Top Top Top claims, and Dahlstrom was the last official president of Centennial, Inc., Dahlstrom became personally involved in the trespass (this issue is more thoroughly treated elsewhere in this amended judgment). Centennial's charter was not reinstated until May 5, 1986, and by these proceedings the Court is aware of Dahlstrom's involvement in the trespass upon Placer's Top claims from April 23, 1986 to the time the original judgment was entered on June 7, 1989.

At the conclusion of Dahlstrom's deposition, Dahlstrom's counsel indicated off the record that Dahlstrom might be able to

create some evidence showing that some of Dahlstrom's activities giving rise to his liability in the above entitled action occurred prior to the filing of the involuntary bankruptcy petition. As a result of that suggestion, Placer prepared and filed a creditor's claim in the Dahlstrom bankruptcy on December 29, 1986. However, no evidence has ever been presented in the above entitled action which would indicate that Dahlstrom's liability in the above entitled action was based upon any of his conduct occurring prior to the filing of his bankruptcy petition. For the two and one half year period following service upon Dahlstrom in the above-entitled action, he never objected to the prosecution of this action against him based upon the bankruptcy proceedings. Indeed, Dahlstrom personally attended every hearing held by this Court in this matter during that period. It was not until late February, 14 1989, a month and a half before the scheduled damage trial, that Dahlstrom first raised the possible bar of these proceedings by the Dahlstrom bankruptcy. However, even after raising that objection and being invited by Placer to present evidence that his liability in these proceedings could be based upon his prepetition conduct, Dahlstrom failed to present any such evidence whatsoever.

In response to Placer's creditor's claim, Dahlstrom filed an objection in the Bankruptcy Court on December 11, 1987.[1] Dahlstrom's objection states that Placer's claim is the subject of various federal and state court proceedings then pending and proceeding to judgment in Nevada and that the Bankruptcy court should make a determination of the validity of Placer's bankruptcy claim based upon the outcome of the Nevada proceedings. From this objection, it is clear that Dahlstrom advised the Bankruptcy Court in December, 1987 that he was pursuing the issue of the validity of Placer's claim to judgment in Nevada court proceedings and, following judgment therein, the

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[1] Placer was never served with Dahlstrom's objection to its creditor's claim and did not learn about that objection until Placer obtained certain records from the Bankruptcy Court in March, 1989.

Bankruptcy Court could make its determination as to what effect, if any, Placer's action and creditor's claim might have oft Dahlstrom's Bankruptcy. Based upon the foregoing, there is no evidence before the Court demonstrating that the above-entitled proceedings against Dahlstrom are barred as a result of his Bankruptcy proceedings.

Dahlstrom's conduct giving rise to his liability in the above-entitled action is his commencement of a trespass upon, and claim of title to the ground occupied by,, Placer's Top mining claims on or about April 23, 1986 and his continuation of the trespass and his claims to title to the ground in spite of overwhelming factual evidence showing that his trespass conduct and his claims of title are absolutely without foundation or legal basis. As a result of that conduct by Dahlstrom, Placer incurred the damages awarded in this amended judgment as a result of Dahlstrom's activities' and his encouragement of his co-defendants to continue their joint trespass upon, and title claims to the ground occupied by, Placer's Top mining claims.

Therefore, the Court determined the following facts:

Dahlstrom's liability in this matter does not represent an antecedent debt, but was incurred partially during the administration of the debtor's estate and substantially thereafter; Dahlstrom's counsel accepted service of the First Amended Complaint long after Dahlstrom was subject to the bankruptcy proceedings; Dahlstrom personally appeared as the debtor-in-possession at all previous hearings in this action and never raised the issue that the prosecution of this action against him might be barred by the Chapter 11 proceedings; Dahlstrom's rejection of Placer's claim filed in the bankruptcy proceedings alerted the Bankruptcy Court to the pendency of these proceedings and indicated that the viability of Placer's claim against Dahlstrom should be judged based upon the outcome of this action.

2. **The Pioneer Claims**. The Pioneer Claims were located on April 25, 1940 by Edward R. Wagner ("Wagner") and Joseph

G. O'Brien ("O'Brien"),, in the same general area as the Top Claims. Shortly thereafter, O'Brien conveyed his interest in the Pioneer Claims to Wagner. On October 26, 1940, Wagner conveyed a one-half interest in the Pioneer Claims to J. K. Luther and Clara Luther, his wife ("Luther"). No annual maintenance filing was made for the year ending July 1, 1941. A Proof of Labor was filed by the locators of the Pioneer Claims for the assessment year ending July 1, 1942; no annual maintenance filing was done for the year ending July 1, 1943. A Notice of ownership and Suspension of Labor for the Pioneer Claims was filed for the year ending July 1, 1944 by Wagner on January 29, 1944, Wagner quitclaimed his remaining one-half interest in the Pioneer Claims to the Deer Trail Tungsten Company ("Deer Trail") . Thereafter, for the assessment years ending July 1, 1944 through 1949, Deer Trail recorded Notices of Ownership and Suspension of Labor for the Pioneer Claims. There is no evidence before the Court of any kind or character tending to show the existence of a "discovery" of a valuable mineral deposit on the Pioneer claims or, even if a discovery had existed at one time in the 1940's, that it continued to exist after June 30, 1949 (the last date of maintenance of the Pioneer Claims by Deer Trail or Luther).

At all times during Deer Trail's corporate existence, the president of Deer Trail was Arthur DeMelik ("DeMelik") and the only other officers were Wagner and DeMelik's wife, Louise DeMelik. Deer Trail made no corporate filings with the Nevada Secretary of State after 1952, with the result that the corporate charter of Deer Trail was revoked in 1954. No annual assessment affidavits or other filings with respect to the Pioneer claims were recorded in the White Pine County Recorder's Office after 1949.

In late June, 1951, J. K. Luther notified Charles Kirker ("Kirker") and Jack Marsh ("Marsh") that his partner, Deer Trail, had failed to perform any assessment work after June 30, 1949 on the Pioneer Claims and had abandoned those claims. Luther advised Kirker and Marsh that he believed the ground was good mineral ground and he proposed that the three of them relocate

the area with new mining claims. As a result, on July 7, 1951, Luther, Kirker, and Marsh located the Copper Dell 1-3, Kennebec 1-3, and the Morrison 1 mining claims ("Marsh Claims") over most of the area previously covered by the Pioneer Claims. The certificates of location for the Marsh Claims were recorded ninety-one days after the location of those claims. The Nevada mining statutes then in effect provided that a mining claim would not be void if a notice of the location "substantially complying" with the statutory requirements was recorded with the county recorder within ninety days after the date of location. 40 Nev. Stat. Ch. 69, p. 92 (March 21, 1941). on July 13, 1951, six days after the location of the Marsh Claims, Messrs. Luther, Kirker and Marsh recorded notices of location for each of the Marsh Claims which substantially complied with the mining statutes. Thus, the requisite notices of the location of the Marsh Claims were timely recorded and the Marsh Claims were validly and properly located in accordance with statutory requirements.

Kirker and Marsh maintained the Marsh Claims (except the Morrison) through September 1, 1962 and timely recorded all the statutorily-required annual assessment affidavits. For several years prior to the abandonment of the Marsh Claims in 1962, they leased the claims to Robert Hunsaker ("Hunsaker"). In 1962 , after completing the annual assessment work, Kirker and Marsh determined that they no longer had any desire to maintain the Marsh Claims and advised Hunsaker that he could have the ground.

During the 1960's and early 1970's numerous individuals and entities located other unpatented lode mining claims on the ground now occupied by the Top Claims and previously occupied by the Pioneer Claims and the Marsh Claims. Six Copper Dell claims were located by Hunsaker on the ground at issue on September 1, 1963. The same ground was relocated with a second set of six Copper Dell claims by Fred E. Anderson on May 10, 1964, and a third set of six Copper Dell claims was located by United States Mining Corp. on July 7, 1965. In addition to the various Copper Dell claims, the CAT 3-12 lode

claims were located on a portion of what is today the Bald Mountain Mine. The CAT Claims were staked on May 26, 1967, and were abandoned in 1972. On May 17 and 18, 1972, the GATO lode claims were staked on a portion of what is now the Top Claims, but the GATO Claims were abandoned before May, 1974. All of these claims were located on the area which the 1985 Defendants allege was the situs of the Pioneer Claims. No one claiming an interest in that ground raised any objections to the staking of the Marsh Claims, the three sets of Copper Dell claims, the CAT Claims, the GATO Claims, or the Top Claims.

After 1949, no other documents pertaining to the Pioneer Claims were recorded with the White Pine County Recorder's Office until 1976, when Gregory Chachas ("Chachas") recorded two maps of the Pioneer Claims. In 1965, Chachas allegedly obtained a deed to the Pioneer Claims from a Nick Diskos, although the authenticity of Diskos' signature and date of issuance of that deed remains undetermined. Although the deed states that Diskos was acting as president of Deer Trail in executing the deed to Chachas, there is no public or other record showing a relationship between Diskos and Deer Trail. The deed is dated eleven years after Deer Trail's charter had been revoked. The Diskos deed was not recorded by Chachas until October 30, 1984, after Placer had publicly announced it would develop the Bald Mountain Mine.

After the 1976 maps, the next public filing of a document for the Pioneer Claims was recorded in September 1980, when Chachas recorded a proof of labor for the Pioneer Claims for the assessment year ending September 1, 1980. On March 27, 1985, after the commencement of this action, Chachas recorded with the White Pine County Recorder Proofs of Labor for the assessment years ending 1973, 1974, 1977, 1978 and 1979. These Proofs of Labor were signed by John Boundy. Boundy did not sign some of the affidavits until March, 1985. Further, the Boundy affidavits which were recorded contained false information as to what work was performed as well as to when such work was 'performed. Not only did Boundy fail to perform

a major portion of the work described in the affidavits, he did not know any of the persons or recognize any of the names of the witnesses who allegedly witnessed his signature on the Proofs of Labor. The affidavits were drafted by Chachas without consultation with Boundy. Boundy has no records to substantiate any of the alleged work. Whether Boundy did any assessment work on the ground covered by the Pioneer Claims cannot be determined.

Chachas and his companies were originally named as defendants in this action because of Chachas' attempt to revive the long abandoned Pioneer Claims. On May 8, 1985, Chachas and his four corporations (to which he had transferred title) executed a quitclaim deed conveying to Placer all of their right, title and interest in the Pioneer Claims. Because the Pioneer Claims were already invalid long before 1974 (the year of location of the Top 1-4 Claims), the quitclaim deed conveyed nothing. On May 9, 1985, Placer recorded a notice which stated that the Pioneer Claims had been abandoned sometime prior to 1974.

3. **The TOP Claims**. Steven Damele and Edgar Hager, Placer's predecessors in interest, located the Top 1-4 lode Claims on may 22, 1974. certificates of location were recorded in White Pine County on August 9, 1974 and amended certificates of location were recorded on August 31, 1979. Placer timely filed the Top Claims with the Nevada State Office of the Bureau of Land Management as required by the Federal Land Policy and Management Act of 1976 (43 U.S.C. §§ 1701 et seq.) . Under a joint venture agreement, Placer obtained the exclusive right to explore, develop and mine the Top Claims in 1975. Placer acquired exclusive title to the Top Claims on February 20, 1986. Damele, Hager, and Placer have complied with all applicable state and federal statutes with respect to the maintenance and development of the Top Claims. On December 14, 1980, Placer located the Top 1A-4A mining claims over the Top 1-4 Claims. The purpose of the relocation was that Placer was not aware of the specific abandonment of the GATO Claims by Cordero

Mining Company in 1973, and therefore was concerned that the 1974 location of the Top 1-4 Claims had not been made on open ground. The relocation was made without prejudice to Placer's existing rights under the Top 1-4 Claims. The actual abandonment in 1973 of the GATO Claims was admitted by Cordero Mining Co. by its permitting a default to be entered against it in these proceedings. Because of these facts and the Court's finding that the Top Claims were valid when located in 1974, the Top 1A through 4A lode mining claims are invalid.

Since 1975, Placer has expended approximately $12,800,000 in exploring, developing, and mining the Bald Mountain Mine. As a result of Placer's work, it delineated a commercial ore body of approximately 4.1 million tons of ore with an average grade of .076 ounces of gold per ton situate within the Top Claims.

During each year from 1974 through 1978, Damele, Hager and Placer have physically occupied the Top Claims at various times of the year. Beginning in 1979, Placer has physically occupied the Top Claims on a full time basis because of its massive exploration and drilling program of the area. By late Spring, 1985, Placer began to construct a mine haul road for the purpose of hauling ore from the Bald Mountain Mine to the processing facilities approximately four miles to the West. In early August, 1985, pit development of the Bald Mountain Mine began with the removal of overburden from the Top Claims. Throughout this period, Placer received no challenges to or complaints concerning its occupancy, exploration or development of the Top Claims. Placer has been in the process of mining the Bald Mountain Mine since September, 1985.

4. **The Top Top Top Claims**. On August 26, 1985, at the instance of Chachas and allegedly acting as an agent for Defendant Action, Wood located the Top Top Top group of four unpatented lode claims. The Top Top Top Claims were staked over but at an angle to those portions of the Top Claims comprising the Bald Mountain Mine. At the time of location,

Wood and Action were well aware of Placer's physical occupancy of the Bald Mountain Mine. Due to a boundary dispute involving the Top Claims and other mining claims, Wood was retained by Messrs. Bida and Belaustegui in 1984 to survey their GA Claims located adjacent to the Top Claims. While conducting his survey, Wood observed a number of Placer's Top claim location monuments. He also knew that the purpose of his 1984 surveying work was to help resolve a boundary dispute involving the Top Claims and the GA claims. Additionally, when Wood located the Top Top Top Claims, Wood noted Placer's abundant activity on the Top Claims. Wood observed the extensive evidence on the ground that Placer was just beginning development of the Bald Mountain Mine pit and was just completing construction of a substantial haul road into the middle of the area where Wood located the Top Top Top claims. Exhibit 42, an air photo admitted into evidence, shows that in the late morning of October 24, 1985, when Wood was erecting the boundary monuments for the Top Top Top claims, several 50-ton Wabco mine trucks were being loaded by a front end loader and large shovel, one exploration drill rig was operating, and one blast hole drill rig was operating at the Bald mountain Mine. At the time when the Top Top Top Claims were located, Wood also knew that the sole basis for locating the Top Top Top Claims was a statement by Chachas about the alleged validity of the Pioneer Claims on May 22, 1974. Subsequent to the original acts of location, Action has not possessed or done any work on the Top Top Top Claims.

Action was incorporated in the State of Colorado on September 19, 1985. Although Wood initially denied any association with the Top Top Top Claims other than surveying them, Wood was listed as one of the three original directors. Wood listed a false address in the articles of incorporation of Action. Wood initially knew that he would own an equitable interest in Action. There is no evidence that Action's incorporators, officers, directors or stockholders have ever conducted or operated Action as a corporation. There have never been any officers, directors', or stockholders' meetings, or

corporate meetings of any type. There are no stockholder records and there is no evidence of the filing of any list of officers or directors in Nevada or Colorado.

Action has never qualified to do business in the State of Nevada. Soon after the location of the Top Top Top Claims, the other two officers of Action became aware of the facts surrounding Placer's ownership and operation of the Bald Mountain Mine and they resigned and disappeared, leaving the "corporation" to Wood. Wood and Action were notified of their trespass on Placer's Top Claims in a letter from Placer's counsel dated October 11, 1985. As a result of Wood's inability to finance a defense to Placer's claims of trespass, Chachas arranged with Dahlstrom to have Centennial acquire the Top Top Top Claims from Action. At the time of these arrangements, the corporate charter of Centennial was revoked and Dahlstrom was its last president and director. Partially because an involuntary petition in bankruptcy had been filed against. Dahlstrom in Salt Lake City on April 18, 1986, Dahlstrom arranged for Centennial to take title to the Top Top Top Claims. All of Dahlstrom's and Centennial's negotiations occurred with Chachas. Dahlstrom knew at the time of negotiations with Chachas that Placer was developing a mine in the overstaked area and had commenced this quiet title action. On April 23, 1986, Action conveyed the Top Top Top Claims to Centennial in exchange for 50% of Centennial's stock. Centennial's charter was not reinstated until May 8, 1986. Centennial and Dahlstrom were aware that Placer had stated its intention to spend $75 million in developing the Bald Mountain Mine. Dahlstrom knew before Centennial acquired the Top Top Top Claims that the official Records of White Pine County disclosed that the Top Claims covered the ground at issue at the time the Top Top Top Claims were located. Dahlstrom also knew that a lis pendens filed in this action and describing the ground here at issue by Government survey had been recorded in the official Records of White Pine County. Despite this knowledge, none of the 1985 Defendants contacted Placer to determine the nature of Placer's claim to or possession of the ground at issue. Additionally, and

in spite of their knowledge of the pendency of this action, Centennial commenced an action on May 9, 1986 against Placer in the Nevada federal court sitting in Las Vegas, alleging that Placer was wrongfully mining the Top Top Top Claims and damaging Centennial in an amount in excess of $100,000,000. The complaint in the federal action was not served on Placer until late summer, 1986. From mid-October 1985 through the summer of 1986, Placer communicated with the 1985 Defendants on numerous occasions in an effort to have them discontinue their trespass on and slander of title to the Top Claims. The 1985 Defendants refused to abandon or otherwise relinquish the Top Top Top Claims. As a result, Placer filed the First Amended Complaint and served the 1985 Defendants an October 31, 1986.

Wood is a licensed surveyor in the State of Nevada. Wood has a bachelor's degree in geology. Wood worked as a mineral examiner for the Bureau of Land Management from 1959 through 1969. Since 1969, Wood has worked as a consultant in the mining industry with respect to the location and maintenance of mining claims on federal land. Wood is very experienced in title work, the determination of claim validity, and the physical location of preexisting mining claims on the ground. Wood is well versed in the Mining Act of 1872 (30 U.S.C. §§21 et seq.), the Federal Land Policy and Management Act of 1976 (43 U.S.C. §§1701 et seq.), and Nevada statutes pertaining to mining claims (Ch. 517).

Dahlstrom is a lawyer who has practiced in Salt Lake City, Utah since 1966. Dahlstrom has a bachelor's degree in accounting, and he specialized in tax law. During his years of practice, Dahlstrom became reasonably well acquainted with the Mining Act of 1872, the Federal Land Policy and Management Act of 1976, and the general principles of mining and real estate law. Dahlstrom was the chief executive officer of several large corporations, including at least one bank, prior to the time he became involved with the Top Top Top Claims.

The 1985 Defendants located and pursued their alleged rights under the Top Top Top Claims with the singular purpose of trying to extract some monetary advantage from Placer by threatening Placer's rights to the Bald Mountain Mine. The 1985 Defendants engaged in knowing and willful conduct in trespassing upon and slandering the title to the Top Claims. The conduct of the 1985 Defendants in this matter was negligent, careless, deliberate, carried out in bad faith, done with malice towards the rights of Placer, intended to be oppressive to Placer, and committed for the purpose of "shaking down" Placer to obtain some monetary advantage from Placer.

5. **Damages.** As a result of the conduct of the 1985 Defendants with respect to the Bald Mountain Mine, Placer has incurred substantial general and specific damages. Placer was required to divert a great many man hours of its employees' time from their regular tasks in developing the Bald Mountain Mine or performing other activities for the benefit of Placer. These man hours were required for engineering and surveying work for the purpose of establishing the specific location and extent of the trespass by the 1985 Defendants, determining what effect the trespass would have on the proposed mining operations and pit development of the Bald Mountain Mine, and helping with the prosecution of the action against the 1985 Defendants and defending the counterclaim of Centennial. Placer employees were diverted from their normal work objectives in the amount of approximately 570 hours as a result of the conduct of the 1985 Defendants. As a result, Placer has lost the value of their wages and salaries, as well as associated fringe benefits and tax payments, solely because and as a direct result of the conduct of the 1985 Defendants. The amount of these damages to Placer as of April 17, 1989 was $11,910.75.

Also as a result of the conduct of the 1985 Defendants with respect to the Bald Mountain Mine, Placer has incurred special damages in the nature of substantial attorney fees and costs specifically incurred in removing the cloud on Placer's title to the Top claims caused by the continuing trespass and slander

of title by the 1985 Defendants. Placer's attorneys were required to expend in excess of 1200 hours of billable time due to such conduct by the 1985 Defendants. The hours billed by Placer's attorneys are very reasonable given the nature and extent of services required in this matter due to the conduct of the 1985 Defendants. The hourly rate of $160 and less charged by Placer's attorneys is very reasonable given the work product, experience and qualifications of the counsel performing those services. As of April 15, 1989, attorney fees incurred by Placer solely as a result of removing the cloud on Placer's title to the Top claims caused by the conduct of the 1985 Defendants were $162,014.50 in attorney fees, plus $13,072.69 in costs, for a total of $175,087.19.

6. **Boundary Agreements**. On September 22, 1982, a Boundary Agreement was entered into between Placer, Bida, Belaustegui, and Amselco Minerals, Inc. ("Amselco") as a complete and binding adjudication of the relative rights and priorities between the owners of the Top, GA and Gator claim groups. A COPY of the September 22, 1982 Boundary Agreement was attached to the First Amended Complaint as Exhibit B. and is attached to this Judgment as Exhibit B. The September 22, 1982 Boundary Agreement accurately defines the rights and priorities of those parties to the Top, GA and Gator claim groups.

On March 6, 1986 a Boundary Agreement was entered into between Placer, Lyle F. Campbell ("Campbell"), and Amselco, Nerco Metals, Inc. ("Nerco") as a complete and binding adjudication of the relative rights and priorities between the owners of the Top claims and the Sky 1, 2, 4, and 6 claims. March 6, 1986 Boundary Agreement declares that portion of Placer's Top Fraction which overlies the Alpine claim group. to be invalid. A copy of the March 6, 1986 agreement was attached to the First Amended Complaint as Exhibit C, and is attached to this Judgment as Exhibit C. The March 6, 1986 Boundary Agreement accurately defines the rights and priorities of those

parties to the Top claims, the Sky 1, 2, 4 and 6 claims, the Top Fraction and Alpine claim group.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. **Dahlstrom's Bankruptcy Proceedings As A Bar.**

a. **The Dahlstrom Bankruptcy Does Not Divest This Court of Jurisdiction.** One of the arguments raised by Dahlstrom in his motions is that the Dahlstrom Bankruptcy divested this Court of jurisdiction over Dahlstrom. State courts are not divested of jurisdiction over defendants' subject to bankruptcy proceedings; rather, state court actions may be stayed by Section 362 of the Bankruptcy Act (11 U.S.C. §362), if applicable, and the issues before the state court may ultimately be determined by the Bankruptcy Court. In re Clowser, 39 B.R. 883 (B.Ct.D.Va. 1984). Accordingly, the Dahlstrom bankruptcy would have stayed the above-entitled action only if Placer's claims against Dahlstrom were subject to the stay provisions of Section 362 of the Act.

b. **Effect Of Placers' Knowledge Of The Dahlstrom Bankruptcy.** In his motions, Dahlstrom has argued that, because Placer knew of his pending bankruptcy by late 1986, Placer is barred from prosecuting the above-entitled action against Dahlstrom due to the application of the automatic stay provisions of Section 362(a) of the Bankruptcy Act [11 U.S.C. §362(a)]. The status of a creditor's knowledge of a pending bankruptcy proceeding is irrelevant with respect to the application of the automatic stay provisions of Section 362(a) of the Act. Matter of Thacker, 24 B.R. 134 (B.Ct.D.Ohio 1982).

c. **The Automatic Stay Provisions Of The Bankruptcy Act Apply Only In Pre-Petition Conduct.** Because there is no evidence of any kind or character indicating that

Dahlstrom's liability in these proceedings is based upon any prepetition conduct, the automatic stay provisions of Section 362(a)(1) of the Act [11 U.S.C. § 362(a)(1)] simply have no application to this Court or the above-entitled action. The provisions of Section 362(a)(1) provide . . . a petition operates as a stay, applicable to all entities, of - (1) The commencement or continuation . . . of a judicial proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title . . .". Section 362
makes it absolutely clear that the stay provisions are "limited to actions which could have been commenced before the commencement of the case or which are based upon claims that arose before the commencement of the case". COLLIER ON BANKRUPTCY, Paragraph 362.04(1] (Rel. 17-12/85). Collier's goes on to state that "claims or actions which arise after the commencement of the case are not included . . . it. (Emphasis supplied) *Id*. Accordingly, because Dahlstrom's conduct giving rise to his liability here did not occur until after the filing of his bankruptcy petition, and because this action could not have been brought against Dahlstrom prior to April 23, 1986, it is clear that the stay provisions of Section 362(a)(1) of the Bankruptcy Act are not applicable.

Notwithstanding the limitation of the automatic stay provisions, Dahlstrom could have applied for a stay of the above-entitled action under Section 105 of the Bankruptcy Act (11 U.S.C §105), which is the omnibus provision providing the Bankruptcy Court with the equity powers to control the debtor-in-possession and the debtor's estate. As of the date of the hearing on Dahlstrom's motion to amend the judgment, Dahlstrom had not made any such application. Dahlstrom chose the alternative of notifying the Bankruptcy-Court of these proceedings and asking the Bankruptcy Court to permit these proceedings to continue for the purpose of adjudicating Placer's claims against Dahlstrom. Therefore, Section 105 of the Act is

now not available to give Dahlstrom the relief he seeks in these proceedings.

d. **Dahlstrom's Trespass.** Nowhere in the Bankruptcy Act is a debtor-in-possession authorized to commence or continue an unlawful trespass or make and continue false title claims after the filing of a petition in bankruptcy. Being a court of equity, the Bankruptcy Court would not under any circumstances be authorized by the Bankruptcy Act to permit a debtor-in-possession to commence or continue such clearly unlawful conduct. Not even the omnibus provisions of Section 105 of the Bankruptcy Act provide the Bankruptcy Court with such powers. Accordingly, the very purposes of the Bankruptcy Act would be perverted if this Court were to bar these proceedings against Dahlstrom under the facts in this case.

This Court has concluded that Dahlstrom's participation in this action and the determination of his rights and liabilities herein were sanctioned by the Bankruptcy Court based upon the relief requested in Dahlstrom's objection to Placer's creditor's claim. To conclude otherwise would mean that Dahlstrom intentionally committed fraud upon and acted in contempt of this Court and the Bankruptcy Court by appearing and participating in this action. The Court further concludes as a matter of law that this action against Dahlstrom and the judgment entered against him herein are not barred by Dahlstrom's Chapter 11 bankruptcy-action.

2. **The Pioneer Claims Were Invalid By July 1, 1951.** The Pioneer Claims were invalid on or before July 1, 1951 for the following reasons:

a. **No Discovery Was Shown To Exist.** There is no evidence before the Court from which the Court could infer the existence of a discovery of valuable minerals on the Pioneer Claims when Luther, Kirker and Marsh located with the Marsh Claims. The discovery of valuable minerals is a necessary element of a valid mining claim under 30 U.S.C. §§ 21 et seq.

Until a discovery is made, the ground is not withdrawn from further location. *Lara v. Secretary of the Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987). If a claimant cannot demonstrate a discovery, others may enter peaceably and openly and establish valid claims. *Belk v. Meagher*, 104 U.S. 279 (1881); *Cole v. Ralph*, 252 U.S. 286 (1920).

b. **The Pioneer Claims Were Intentionally Abandoned.** In order to effectuate an abandonment, two elements must appear together. The owner must give up possession of his property as well as have a present intent to abandon it. *Mallet v. Uncle Sam Mining Company*, 1 Nev. 188 at 204-205 (1865) ; *see also, Crofoot v. Hill*, 74 Nev. 173 (1958) ; *Martin v. Sterner*, 75 Nev. 350 (1959). Through express statements made by Luther, one of the owners of the Pioneer Claims, possession of the Pioneer Claims was relinquished, and the Pioneer Claims were intentionally abandoned, by Deer Trail and Luther prior to July 1, 1951.

c. **The Failure To Perform Assessment, Work Caused A Forfeiture Of The Pioneer Claims Due To Intervening Locations.** Once a claim is "valid", it must be maintained annually in order to prevent its forfeiture by others locating the same ground. 30 U.S.C. §28 requires the owner of a mining claim to perform at least $100.00 worth of labor or improvements on each claim during each assessment year. The statute also states that "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such locations". 30 U.S.C. §28. Additionally, the work must be of "such a character as directly tends to develop and protect the claim and facilitate the extraction of minerals." *Great Eastern Mining Inc. v. Metals Corporation of America*, 527 P.2d 112 (N.M. 1974). The purpose of this requirement is to assure that mining

claims are diligently developed. Additionally, although assessment work does not have to be performed openly, and may be performed below the surface of a claim, (*Mining Company v. Barclay*, 82 F. 554 (C. C. Nev. 1897)), if no visible evidence of assessment work exists after years have passed, it is considered evidence that no work was done. *United States v. Mobly*, 45 F.Supp. 407 (D.C. Cal. 1942). The performance of assessment work has been determined to be a condition of the claimant's right to hold the claim. *Wilbur v. United States ex. rel. Krushnic*, 280 U.S. 306 (.1930).

There is no evidence that the requisite assessment work was performed on the Pioneer Claims after the end of the 1949 assessment year. Therefore, the ground at issue was open to location at the times when the Marsh Claims, the three sets of Copper Dell claims, the CAT Claims, the GATO Claims, and Top Claims were located. The location of these claims, in each instance, worked a forfeiture of the Pioneer Claims, assuming they had not been abandoned.

d. **The Pioneer Claims Could Not Be Rejuvenated After Forfeiture**. The location of the Marsh Claims, the three sets of Copper Dell claims, the CAT Claims, the GATO Claims,, and Top Claims at a time when no assessment work was being performed on the Pioneer Claims caused a forfeiture of the Pioneer Claims. 30 U.S.C. § 28. After such forfeiture, the Pioneer Claims could not be brought back into existence by the recommencement of assessment work. Public Service Company of *Oklahoma v. Bleak*, 134 Az. 311, 656 P.2d 600; *Florence-Rae Copper Co. v. Kimball*, 85 Wash. 162, 147 P. 881 (1915) ; *Knutson v. Fredlund*, 56 Wash. 634, 106 P. 200 (1910) (1982) ; 2 American Law of Mininct §8.7H (1960) ; 2 C. Lindley, *Lindley on Mines* §651, at 1632-33 (3d ed. 1914).

e. **The Quitclaim Deed To Placer And The Notice Of Abandonment Did Not Reinstate The Pioneer Claims.** The quitclaim from Chachas and his companies to Placer did not act

as a reinstatement of the Pioneer Claims; rather, as standard industry practice, the quitclaim deed effectively eliminated any claim of Chachas and his companies to the Bald Mountain Mine. Additionally, Placer's notice of abandonment was an effective, customary method of confirming the abandonment of the Pioneer Claims at an earlier date and did not constitute recognition that the Pioneer Claims were valid and subsisting on the date of execution of the notice of abandonment.

3. **The Top Claims Are Valid**. Except as noted below, the Top Claims are valid and subsisting mining claims for the following reasons:

a. **Ground Open To Location on May 22, 1974**. At the time the various Top claims described in Exhibit A were located, the ground covered by those claims was open to location, with the exception of the Top 1A through 4A Claims. The Top 1A through 4A Claims are invalid because at the time of their location the ground was occupied by the valid Top 1 through 4 claims.

b. **Statutory and Regulatory Compliance**. The Top Claims were recorded and filed in accordance with existing statutes and regulations. Nev.Rev.Stat. ch. 517; 30 U.S.C. §§ 21 et seq.; 43 U.S.C. §§ 1701 et seq.

c. **Assessment Work Requirements Complete**. The Top Claims have been maintained in accordance with applicable statutes and regulations, and all requisite filings and recordings have been timely and properly made. Nev.Rev.Stat. ch. 517; 30 U.S.C. 21 et seq.; 43 U.S.C. §§ 1701 et seq.

d. **Discovery On The Bald Mountain Mine**. Placer has demonstrated that the Top Claims comprising the Bald Mountain Mine have a discovery. *Castle v. Womble*, 19 L.D. 455 (1894) ; *United States v. Coleman*, 390 U.S. 599 (1968).

e. All Mining Claims And Other Rights In Conflict With The Top Claims Are Invalid. The Top Claims are valid and confer on Placer the superior right to explore for, develop and mine the valuable minerals contained in, on or under the ground covered by the Top Claims, subject only to the paramount title of the United States.

4. **The Top Top Top Claims Are invalid.** The Top Top Top Claims are invalid for the following reasons:

a. **Ground Not Open To Location At Time Of Location.** The Top Top Top Claims were located on ground not open to location on August 26, 1985 due to the valid Top Claims. A junior locator can acquire no rights in ground encompassed by a perfected senior location. *Delmonte Mining and Milling Company v. Last Chance mining and Milling Company*, 171 U.S. 78 at 79 (1898).

b. **The Top Top Top Claims Were Located In Bad Faith.** Wood and Action had specific knowledge of the prior existence of Top Claims and did not make any effort to verify the alleged title deficiencies of the Top Claims upon which they relied in locating the Top Top Top Claims. Where a junior locator has knowledge of the location of a senior location and the present intent of the senior locator to work the ground, the junior locator cannot enter the ground in good faith. *Claybaugh v, Gancarz*, 81 Nev. 64, 398 P.2d 695 (1965) ; accord, *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F.Supp 429 (D.Nev. 1976), affirmed, 605 F.2d 564 (9th Cir. 1977).

5. **September 22, 1982 Boundary Agreement.** The Boundary Agreement dated September 22, 1982, between Placer, Bida, Belaustegui, and Amselco constitutes a binding adjudication of rights and priorities of the owners of the Top, GA and Gator claim groups.

6. **March 6, 1986 Boundary Agreement.** The Boundary

Agreement dated March 6, 1986, between Placer, Campbell, Amselco land Nerco constitutes a binding adjudication of the rights and priorities of the owners of the Top claims, the Ski 1, 2, 4, and 6 claims, the Top Fraction and Alpine claim group.

7. **Liability of Wood And Dahlstrom Individually.**

a. **Wood is Individually Liable And Is The Alter Ego Of Action.** At the time Wood located the Top Top Top Claims, Action was not incorporated. Therefore, Wood,, as the locator, was the initial party who trespassed upon and slandered the title to the Top Claims. *Jacobson v. Stern*, 96 Nev. 56, 605 P.2d 198 (1980). Because Action has never been treated or operated as a corporation, and because Wood is the only person who acted for and on behalf of Action, Wood is the alter ego of Action. As such, Wood is individually liable for all actions he took allegedly on behalf of Action. *Rowland v. Lepire*, 99 Nev. 308, 662 P.2d 1332 (1983).

b. **Dahlstrom Is Individually Liable.** NRS 78.751 does not appear to shield corporate officials from the results of their tortious acts. The statute provides for permissive indemnification by the corporation if the official was acting 'tin good faith in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful." NRS 78.751(1). Even a judgment or conviction does not, of itself, preclude permissive indemnification. id. Indemnification may be made only if, and only to the extent that, the court in which the action was brought (or other court of competent jurisdiction) determines upon application that in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court deems proper. NRS 78.751(2). To the extent that the person has been successful on the merits he must be indemnified by the corporation against expenses incurred in connection with his defense. NRS 78.751(3). An official may not be indemnified, in spite of any agreement or provision between

himself and the corporation to the contrary, if a final adjudication establishes that his acts involved intentional misconduct, fraud, or a knowing violation of the law and were material to the cause of action. NRS 78.751(6)(a). Cf. NRS 26 78.037 (1)(a).

NRS 78.180 allows for the reinstatement of a corporation, which has forfeited its right to transact business, by payment of all costs, fees, licenses, penalties, etc., due and in arrears. When such payments have been made the Secretary of State may then issue a certificate of reinstatement authorizing the corporation to transact business as if the filing fee had been paid when due", NRS 78.180(2)(a), and restoring "to the corporation its right to carry on business in this Nevada, and to exercise its corporate privileges and immunities." NRS 78.180(l)(b). (Emphasis added) Neither NRS 78.180 nor NRS 78.751 appear to confer absolute immunity against tort liability upon a corporate official.

As to the applicability of Utah law to Dahlstrom's individual liability, the Court reaches the following conclusions of law. NRCP 17(b) provides that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless a statute of Nevada provides to the contrary. A foreign corporation's right to maintain or defend a lawsuit is subject to NRCP 17(b) and NRS 80.210(1). *Bader Enter., Inc. v. Olsen*, 98 Nev. 381, 649 P.2d 1369 (1982). NRS 80.210 provides that a corporation which does not comply with the rules regarding qualifications of foreign corporations to do business in Nevada (NRS 80.010-.040) shall not be allowed to maintain or defend an action in Nevada. *Id*. Corporations may sue and be sued in all courts in like manner as individuals. Nev. Const. Art. 8, § 5. Based on the foregoing, there does not appear to be any doubt that Centennial's capacity to maintain or defend an action in Nevada is determined by Nevada law. There is no relationship between the capacity of Centennial to be in a Nevada courtroom and the immunity from his tortious acts claim by Dahlstrom based upon his prior capacity as a corporate officer. Accordingly, Dahlstrom is not shielded or immunized

from the results of his tortious acts simply because Centennial was a revived corporation and that upon reinstatement the corporation was authorized to one again exercise its corporate privileges and immunities and transact business as if the suspension had not occurred. Nevada law specifically prohibits absolute immunization of corporate officials from tort liability. Dahlstrom is, then, subject to the judgment as being jointly and severally liable with the other 1985 Defendants. While Dahlstrom may seek reimbursement from his co-1985 Defendants, he presented no evidence that he was less culpable than those other defendants. Therefore, the judgment cannot deal with the issues of indemnification or reimbursement among or between the various 1985 Defendants.

8. **Conduct Of The 1985 Defendants.**

a. **Intentional Trespass By Wood And Action.** Wood and Action intentionally trespassed upon the Top Claims when they located the Top Top Top claims.

b. **Intentional Slander Of Title By Wood And Action.** Wood and Action intentionally slandered the title of Placer to the Top Claims, the Bald Mountain Mine, and the mineral ground covered thereby.

c. **Intentional Continued Trespass And Slander of Title.** The 1985 Defendants intentionally continued their trespass and slander of title after receiving written notice and having knowledge of the underlying Top Claims and Placer's possession and working of the same.

d. **Bad Faith.** The 1985 Defendants acted in bad faith in claiming that the Top Top Top Claims were valid, that the Top claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

e. **Negligence.** The 1985 Defendants were negligent in claiming that the Top Top Top claims were valid, that the

Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

f. **Carelessness.** The 1985 Defendants were careless in claiming that the Top Top Top Claims were valid, that the Top claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

g. **Malicious.** The 1985 Defendants acted with malice in claiming that the Top Top Top Claims were valid, that the Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain mine.

h. **Oppression.** The 1985 Defendants acted oppressively in claiming that the Top Top Top Claims were valid, that the, Top claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

i. **Knowing And Deliberate.** The 1985 Defendants acted knowingly and deliberately, and in flagrant violation of the mining laws, in claiming that the Top Top Top Claims were valid, that the Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

9. **June 20, 1989 Judgment Based On False Evidence.** In his motion to amend the June 7, 1989 Judgment, Dahlstrom alleged that counsel for Placer falsely represented to the Court that bankruptcy court records indicated that Mr. Dahlstrom's estate was valued at $15 million, that Dahlstrom owned a home worth $11.5 million, and that Dahlstrom was earning about $1 million per year. Placer alleged that it had bankruptcy court documents on which its representations were based; that Dahlstrom refused to supply financial information; that the documents had just been received from the bankruptcy court and were the best information available at the time pertaining to Dahlstrom's financial condition; that the information was not offered as evidence, and that the bankruptcy information was not a basis for the judgment. submitted copies of the disputed

documents upon which its representations were made. Placer also submitted an excerpt from the trial transcript showing that Placer's counsel recognized that the information was not being offered as evidence; that Placer had been unable to get certified copies of all the bankruptcy records; that Placer had no information on Defendant Wood's financial condition; and that the Court should award punitive damages without full knowledge of the 1985 Defendants' financial conditions.

SCR 172 says that "a lawyer shall not knowingly make a false statement of material fact or law to a tribunal," or offer evidence that the lawyer knows to be false. SCR 173 provides that a lawyer shall not falsify evidence, or, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

From a careful examination of the record, the Court concludes that Dahlstrom's contentions in this regard are frivolous and entirely without merit. If the records obtained from the Bankruptcy Court were incomplete or erroneous, failure to correct must be attributable to Dahlstrom, who failed to comply with a discovery demand to produce his records. In any event, the bankruptcy records were not relied upon in reaching the decision and judgment ultimately entered, and are not relied upon in this amended judgment. Placer's counsel carefully limited his offer in a manner consistent with the canons of professional ethics.

10. **Damages.**

a. **Compensatory damages.** The purpose of general or compensatory damages is to compensate the injured party for damages actually sustained. *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962). General damages. mean money compensation for loss, damage or injury. *Johnson v. Wells Fargo & Co.*, 6 Nev. 224 (1870). Once liability is found, an award of general or compensatory damages is mandatory. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The trier of the fact is

authorized to award such damages as will make the injured party whole for all of the injuries resulting directly from the wrongful and unlawful conduct. *Quigley v. Central Pacific R.R. Co.*, 11 Nev. 350 (1876). Where there is a wilful trespass, the trespasser will be liable for compensation, as damages, for all losses actually sustained as a direct result of the trespass. *Gerlach Livestock Company v. Laxalt*, 52 Nev. 191, 284 P. 310 (1930). Accordingly, Placer is entitled to an award of damages for lost employee hours incurred solely as a result of the 1985 Defendants' intentional trespass and slander of title conduct in the amount of $11,910.75.

It is well established in Nevada that attorney's fees cannot be recovered unless authorized by agreement or by statute or rule. *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902 (1987). Cf. *Sun Realty v. District Court*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975); *Schouweiler v. Yancy Co.*, 101 Nev. 827, 712 P.2d 786 (1985); *Guild & Hagen v. First Nat'l Bank of Nevada*, 95 Nev. 621, 622, 600 P.2d 238 (1979). It has long been the rule in Nevada that attorney's fees may be recoverable in wrongful injunction or wrongful attachment cases. *Artistic Hairdressers Inc. v. Levy*, 87 Nev. 313, 316, 486 P.2d 482 (1971); cf. *Glen Falls Insur. Co. v. First Nat'l Bank*, 83 Nev. 196, 427 P.2d 1 (1967) ; *McIntosh v. Knox*, 40 Nev. 403, 165 P. 337 (1917); *Amer. Fed. Musicians v. Reno's Riverside*, 86 Nev. 695, 475 P.2d 220 (1970); *Lander Co. Comm. v. Cirac*, 98 Nev. 57, 59, 639 P.2d 538 (1982) (We have previously held that attorney's fees may be awarded as damages in a suit for injunctive relief when properly pleaded and proved). These awards are provided for by NRCP 65(c). In cases where plaintiff seeks declaratory or other non-monetary relief, attorney's fees may not be awarded. *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P. 2d 902 (1987); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970); *International Indus. v. United Mtg. Co.*, 96 Nev. 150, 606 P.2d 163 (1980). Where equitable relief is sought an award of attorney's fees is proper if awarded as an item of damages. *Von*

Ehrensmann v. Lee, 98 Nev. 335, 647 P.2d 377 (1982); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970).

NRS 18.010(2) provides that, in addition to cases where attorney's fees are authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party when the prevailing party has not recovered more than $20,000, or, when the court finds that the defense of the opposing party was brought without reasonable ground, or to harass the prevailing party. The award of attorney's fees under the statute is discretionary. *Id.*

An award of attorney's fees under NRS 18.010, where the prevailing party did not receive more than $20,000, was not an abuse of discretion where the district court enunciated its reasons for the award. *Farmers Insur. Exchcange v. Pickering*, 104 Adv. Op. 104, 765 P.2d 181 (1988). An award of attorney's fees in a case where the prevailing party recovered more than $20,000 was upheld where the district court reasoned that a finding of bad faith against an insurance company was at least tantamount to finding that the insurance company's defense was maintained without reasonable ground. *Farmers Home Mutual Insur. Co. v. Fiscus*, 102 Nev. 371, 376, 725 P.2d 234 (1986). In addition, the insurance company was ordered to pay the prevailing respondents' attorney's fees on appeal. *Id.* at 377.

The judgment, as a conclusion of law, states that the Top Top Top claims were located in bad faith, and that the 1985 Defendants acted knowingly and deliberately in flagrant violation' of the mining laws, in claiming that the Top Top Top claims were valid and that the Top claims were invalid. The judgment, 'as a further conclusion of law, states that the trespass and slander of title conduct of the 1985 Defendants began and continued willfully, knowingly, maliciously, and oppressively. These conclusions of law are sufficient grounds for the court to conclude that Dahlstrom's defense was maintained without reasonable grounds and provide justification for the award of

attorney's fees. Cf. *Farmers Home Mutual Insur. Co. v. Fiscus, supra*. The court has justified this discretionary award with lengthy findings of fact and conclusions of law and has set forth sufficient reasons for making the award so as to meet the "sufficient reasons" rule in *Farmers insurance Exch. v. Pickering*, 104 Adv. Op. 104, 765 P.2d at 182.

There are other cases upholding that proposition that in Nevada attorney's fees may be awarded as damages in equity suits where no other damages are awarded, if the fees are pleaded as damages. In *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P.2d 377(1982), the Court held that, in an action for specific performance of a real estate transaction, attorney's fees were improperly awarded to the prevailing party, but the award of attorney's fees would have been proper if they had been awarded as compensatory damages incurred as a result of defending the equity suit. *Id*. at 337-338. The Court reiterated the well established rule that, "absent an agreement between the parties, attorney's fees may not be awarded unless by statute or rule. *Sun Realty v. District Court*, 91 Nev. 774, 542 P.2d 1072 (1975). *See*, NRS 18.010." *Id*. at 337. The Court then said:

> Where equitable relief is sought, an award of attorney's fees is proper if awarded as an item of damages. *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970). We decline to conclude that the fees are awarded as damages where, as here, the district court has not specified the award as such nor has the respondent counterclaimed for damages. *Id*. at 338.

Thus, the Nevada Supreme Court makes it clear that, in an equity situation, the prevailing party may be awarded attorney's fees if they are pleaded and awarded as compensatory damages. Cf. *American Fed. Musicians v. Reno's Riverside*, 86 Nev. 695, 699, 475 P.2d 220 (1970); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970).

In slander of title cases, attorney's fees may be awarded as damages if the fees are incurred in removing the cloud on the title. *Day v. West Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067 (1985) (In a slander of title action, the district court did not err in exercising its discretion in refusing to award attorney's fees as special damages where special damages weren't proven and proof of special damages is an element of the action for slander of title.); *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982) (In a slander of title action attorney's fees and costs may be awarded as special damages incurred in removing the cloud of title even if no other special damages resulting from the slander of title are proven).

In summarizing the general rule in Nevada, attorney's fees cannot be awarded unless authorized by agreement, statute, or rule. Under NRS 18.010(2) the court has discretion to award attorney's fees to the prevailing party when that party has not recovered more than $20,000, or when the opponents' defense was brought without reasonable grounds, or to harass. However, there seems to be an exception to this general rule. In equity cases, attorney's fees may be awarded in wrongful injunction cases if the fees were incurred in an effort to dissolve the injunction (these fees are provided for by NRCP 65(c)), or if attorney's fees are pleaded and awarded as special damages in equity proceedings where no significant other monetary damages are awarded. (wrongful attachment, and specific performance of a real estate contract). In slander of title actions where proof of special damages, including attorney's fees incurred in clearing the cloud on the title, must be shown, attorney's fees may be awarded in addition to punitive damages.

In summary, the attorney's fees awarded to Placer as are amply supported by statue and case law. The award also have been proper as an award of attorney's fees under 18.010(2) which allows for such an award to the prevailing when the opponent's defense was brought without reasonable grounds, or to harass. Of course, the attorney's fees here were awarded under this statute; they were awarded as damages. Placer should

receive an award of damages for attorney's fees incurred solely as a result of clearing title to the Top claims caused by the 1985 Defendants' trespass and slander of title conduct in the amount of $162,014.50.

Courts have uniformly allowed the recovery of the costs by a party in prosecuting a trespass upon or defending to real property. *Dalton v. Bowker*, 8 Nev. 190 (1873); *Thomas v. Palmer*, 49 Nev. 438, 248 P. 887 (1926). Therefore, is entitled to an award of damages for costs incurred as a result of the 1985 Defendants' intentional trespass slander of title conduct in the amount of $13,072.69.

b. **Treble Damages For Trespass.** Placer may not receive an award of treble the amount of the compensatory damages and damages. This conclusion of law is analyzed at length at pages 19-24 of this Court's October 20, 1989 Ruling on Dahlstrom's Motion to Amend. That analysis will not be repeated here, but is simply adopted as the applicable conclusion of law.

c. **Punitive And Exemplary Damages.**

1. Damages Recoverable in a Slander of title Cause of Action. Slander of title, a tort, occurs when a false and malicious statement, oral or written, is made in disparagement of a person's title to real or personal property, causing injury. 50 Am. Jur.2d, Libel and Slander §539. The essential elements of this cause of action are (1) the uttering and publication of the slanderous words, (2) the falsity of the words, (3) malice, and (4) special damages. The action is not for the words spoken, but for the special damages resulting from their utterance or publication. *Id.* at §541. it is generally agreed that recovery may be had only of special damages as distinguished from general damages. *Id.* at §550. Special damages in this instance may be loss of an impending sale or lease, and under proper pleading and proof recovery may be had for loss of trade, business, or rents, and the necessary expenses, including attorney's fees, incurred in clearing

plaintiff's title, such as occurred in this case. However, unless authorized by statute, attorney's fees incurred in prosecuting the case as a whole, as distinguished from those incurred in merely removing the cloud of title, are generally not recoverable as damages or costs. *Id.*, esp. fn. 7.

Although punitive damages are not recoverable as a matter of right in an action for slander of title, they are recoverable "if they are justified by the evidence, and if, according to some authorities, actual damages are shown . . . [A]s in other cases punitive damages should be in a reasonable proportion to actual damages." 50 Am. Jur.2d, Libel & Slander §551.

The rule in Nevada appears to be that attorney's fees may be recovered as a discretionary special damages award if the fees were incurred in removing the cloud of title, even if there were no other damages incurred such as loss of vendibility of the real estate. *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982); *Day v. West Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067 (1985). Punitive damages may be added under NRS 42.010 when fraud or malice are shown. *Summa*, 98 Nev. at 535.

2. **Punitive Damages May Be Assessed Without Any Evidence of Financial Condition.** In Ace Truck the "financial annihilation" rule, the "shock the conscience rule" and the "passion and prejudice" rules of appellate review of punitive damages awards are replaced with the following rule:

> "Punitive damages are legally excessive when the amount of damages awarded is *clearly disproportionate* to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent, or malicious conduct of the tort feasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is *reasonably necessary and fairly*

> *deserved* in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive." (Emphasis added) *Id.* at 509.

The Nevada Supreme Court then tells how a reviewing court may arrive at the ultimate judgment of where excessiveness begins:

> "[C]ourts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can properly be imposed in a given case. Relevant circumstances include such matters as *the financial position of the defendant*, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offending party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind." (Emphasis added) *Id.* at 510.

A thorough reading of *Ace Truck* reveals that a defendant's financial condition is one of several factors which may be considered in assessing punitive damages. *Ace Truck* at 510, *supra*. However, in *Ainsworth v. Combined Ins. Co.*, 104 Adv. Op. 92, 763 P.2d 673 (1988), the court said:

> "[W]e note that the financial position of the defendant is still relevant to the determination of the amount of the punitive damage award. The wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior."

(Emphasis added) *Id.* at 6.

In *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962), a jury awarded $15,000 in special damages and $30,000 in general damages in a malicious prosecution case plus $50,000 in punitive damages. The Court ordered a new trial because it considered the special and punitive damages to be excessive.

> "Evidence was received relevant to the financial condition of Dr. Miller [the wrongdoer]. His net worth was established to be about $51,000. The jury may have speculated that he had undisclosed assets. If so, it stepped outside the evidence. *Id.* at 310.

In spite of the language in *Miller*, the court, in *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 396 P.2d 855 (1964), specifically stated that *Miller* does not support the proposition "that it was error to assess punitive damages without a showing of the financial worth of the defendants against whom they were assessed." *Id.* at 518. The Hotel Riviera court concluded: "We accept the view of the California court that it is not essential to show defendants' wealth in seeking exemplary damages." *Id.* at 520.

The *Hotel Riviera* rule was discussed in *Clark v. Bunker*, 453 F.2d 1006 (9th Cir. 1972). There, the Ninth Circuit upheld a punitive damages award where the total net worth of the defendant was not adduced at trial.

> "It was not necessary for the total worth of Bunker to be assessed prior to an award of punitive damages against him. *Hotel Riviera Inc. v. Short*, 80 Nev. 505, 396 P.2d 855, 863 (1964). The award was proper in the absence of evidence showing the likelihood that the specified amount would destroy Bunker financially. See, *El Rancho, Inc. v. First National Bank*, 406 F.2d 1205, 1218-1219 (9th Cir. 1968)." *Id.* at 1012, fn. 11.

In El Rancho, a punitive damages award of $225,000 was affirmed. The wrongdoer argued that the award was "manifestly excessive since lone may be punished without being destroyed." *Miller v. Schnitzer*, 78 Nev. 301, 311, 371 P.2d 824, 829 (1962)." *Id.* at 1218. The El Rancho court said, "[the wrongdoer] introduced no evidence showing his ability to pay. Consequently we are in no position to determine what amount of punitive damages will punish him without at the same time destroying him." *Id.*

In summary, the rule in Nevada is that punitive damages may be awarded absent evidence of the wrongdoer's net worth as long as there is no evidence that the award will financially destroy the wrongdoer. Here, none of the 1985 Defendants has ever offered any such evidence in spite of discovery requests to do so.

3. **The Vulnerability of the Plaintiff Need Not Be Considered in Determining the Amount of Punitive Damages to be Awarded.** In *Ace Truck, supra*, the Court stated: "Because the purpose of punitive damages is to punish and deter, the courts in examining these awards should focus on the character of defendants conduct," rather than on the injury suffered by the plaintiff. *Id.* at 506.

In *Ainsworth, supra*, in affirming a $5,939,000 punitive damages award against 'an insurance company, the court considered "the vulnerability of, and injury suffered by, the offended party". Ainsworth's "vulnerability" was only one of five factors the court considered in affirming the judgment, the others being (1) the financial position of the defendant; (2) the culpability and blameworthiness of the offending party; (3) the offensiveness of the punished conduct when compared to societal values of justice and propriety; and (4) the effect of the award as a means to deter future misconduct. *Id.* at 6-7. *See also, United Fire Insur. Co. v. McClelland*, 105 Adv. Op. 100 (Sept. 6, 1989). Of these five factors, four focus on "the character of

defendant's conduct," *Ace Truck* at 506, or the deterrence factor. *Ainsworth* allows an awarding court to consider the overall effect of the offending actions on the offended party, but does not indicate that the offended party's "vulnerability" is to be given more weight than the long-established factors of punishment and deterrence. A fair reading of *Ainsworth* would seem to indicate that plaintiff's vulnerability should be weighed when the offending party is in a superior financial position relative to the offended party, i.e., be viewed as an aggravating circumstance, not be viewed as a mitigating circumstance in a situation where, as here, the offended party is in a superior financial position relative to the offending party.

In summary, this Court concludes that punitive damages in the amount of One Million Dollars ($1,000,000.00) should be awarded to Placer against the 1985 Defendants, jointly and severally. The court concludes that the 1985 Defendants' conduct, under the facts present here, in "jumping" Placer's claims, was flagrant, malicious, oppressive and done with conscious disregard to Placer's property rights. When all of the facts were discovered, after substantial effort and expense to Placer, the 1985 Defendants continued to assert frivolous and fraudulent defenses. These facts were known to the 1985 Defendants or could have been discovered by the exercise of reasonable diligence as they were by Placer's agents and attorneys. After such facts having been exposed, this Court was not surprised by the 1985 Defendants' failure to appear for trial. As a trial tactic, their absence at the trial may have been a calculated strategy since a jury may have awarded even greater punitive damages than this Court awarded, in view of the callousness of the 1985 Defendants' conduct, the lack of any merit to their purported defenses, and their assertions of having performed assessment work when it would have been impossible for them to do so lawfully. Such defenses must be characterized as a sham or a fraud; a public trial would have exposed them as such. Under such circumstances, if any error occurred in the assessment of punitive damages, it may exist in the inadequacy of the punitive damages award in view of the callousness of the

conduct of the 1985 Defendants and some of their previous associates.

JUDGMENT

Based on the foregoing Findings of Fact, Conclusions of Law, and all of the evidence admitted at the hearings held by the Court and at the damage trial, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Pioneer Claims were invalid on or before July 1, 1951.

2. The Top claims, as described in Exhibit A attached to this Judgment and incorporated herein, are valid and confer on Placer the superior right to explore for, develop and mine the valuable minerals contained in, on or under the ground covered by the Top Claims, subject only to the paramount title of the United States.

3. The Top 1A through 4A Claims are invalid and were void ab initio.

4. The Top Top Top Claims are invalid and were void ab initio.

5. The Court recognizes, ratifies, and adopts the Boundary Agreement dated September 22, 1982, between Placer, Bida, Belaustegui and Amselco (a copy, of which is attached hereto as Exhibit B) as being a complete and binding adjudication of the relative rights and priorities between the owners of the Top, GA and Gator claim groups as described in said Boundary Agreement. The Court further finds the rights and obligations of the parties thereunder to constitute a binding legal obligation, and the parties are ordered to comply therewith.

6. The Court recognizes, ratifies, and adopts the Boundary Agreement dated March 6, 1986, between Placer, Campbell, and Amselco and Nerco (a copy of which is attached hereto as Exhibit C) as being a complete and binding adjudication of the relative rights and priorities between the owners of the Top claims, the Sky 1, 2, 4. and 6 claims, the Top Fraction and the Alpine claim group as described in said Boundary Agreement. The Court further finds the rights and duties of the parties thereunder to constitute a binding legal obligation, and the parties are ordered to comply therewith.

7. Placer Dome U.S. Inc. is awarded compensatory damages against each of Defendants Centennial, Inc.; John A. Dahlstrom; Action mining Company, Inc.; and Arnold C. Wood, jointly and severally, in the amount of One Hundred Eighty Six Thousand Nine Hundred Ninety Seven and 94/100 Dollars ($186,997.94), with interest accruing at the rate of twelve percent (12%) per annum from April 17, 1989 until paid.

8. Placer Dome U.S. Inc. is awarded exemplary and punitive damages against each of Defendants Centennial, Inc.; John A. Dahlstrom; Action Mining Company, Inc.; and Arnold C. Wood, jointly and severally, in the amount of One Million Dollars ($1,000,000.00), with interest accruing at the rate of twelve percent (12%) per annum from the date hereof until paid.

9. The counterclaim of Centennial is dismissed with prejudice.

Dated this 22nd day of December 1989.

/s/ William P. Beko
DISTRICT JUDGE

APPENDIX C

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WHITE PINE

PLACER U.S. INC., a California corporation, (formerly known as Placer Amex, Inc.),

Plaintiff,

No. 13022

V.

EDWARD R.WAGNER, et al.,

Defendants.

RULING ON DEFENDANT JOHN A. DAHLSTROM'S EDWARD R. WAGNER, et al., MOTION TO AMEND JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL

This matter came before the court on September 21, 1989, for argument and consideration of defendant John A. Dahlstrom's Motion to Amend Judgment or in the Alternative for a New Trial.

Mr. Dahlstrom appeared personally in proper person. Plaintiff was represented by M. Craig Haase, Esq., of Reno. After considering the briefs and oral arguments on each of the nine grounds for relief, the court finds and concludes as follows (each ground is considered separately):

1. **The court erred in holding that Mr. Dahlstrom is individually liable.**

Mr. Dahlstrom sets forth the following reasons why he should not be individually liable:

(1) Centennial was suspended in Utah, then revived and reinstated on May 5, 1986. The quitclaim transaction was completed on April 23, 1986, by a new Board, after Mr. Dahlstrom had resigned.

(2) General and Utah law says that reinstatement validates acts of the corporation done while the corporation was suspended, and therefore officers are shielded from individual tort liability resulting from acts of the corporation.

(3) NRS 78.180 allows for reactivation of a corporation which acts to retroactively validate acts of the corporation done while suspended; thus officers and directors are protected from individual tort liability.

Plaintiff opposes these points by saying:

(1) The judgment contains a long list of reasons why Dahlstrom should be individually liable;

(2) Dahlstrom in effect admits that the judgment against Centennial was correct, but Centennial's liability does not diminish Dahlstrom's personal liability;

(3) Dahlstrom is jointly and severally liable along with the other defendants.

NRS 78.751 does not appear to shield corporate officials from the results of their tortious acts as alleged by Mr. Dahlstrom. The statute provides for permissive indemnification by the corporation if the official was acting "in good faith in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful." NRS 78.751(1). Even a judgment or conviction does not, of itself, preclude permissive indemnification. *Id*. Indemnification may not be made unless and only to the extent that the court in which the action was

brought (or other court of competent jurisdiction) determines upon application that in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court deems proper. NRS 78.751(2). To the extent that the person has been successful on the merits be must be indemnified by the corporation against expenses incurred in connection with his defense. NRS 78.751(3). An official may not be indemnified, in spite of any agreement or provision between himself and the corporation to the contrary, if a final adjudication establishes that his acts involved intentional misconduct, fraud, or a knowing violation of the law and was material to the cause of action. NRS 78.751(6)(a). Cf. NRS 78.037(1)(a).

NRS 78.180 allows for the reinstatement of a corporation, which has forfeited its right to transact business, by payment of all costs, fees, licenses, penalties, etc., due and in arrears. When such payments have been made the secretary of state then issues a certificate of reinstatement "authorizing it to *transact business as if the filing fee had been paid when due*", NRS 78.180(2)(a), and restoring "to the corporation its right to carry on business in this state, and to *exercise its corporate privileges and immunities*." NRS 78.180(1)(b). (Emphasis added) This is apparently the language Mr. Dahlstrom relies on when he says that reinstatement retroactively validates the actions taken by the corporation while it was under suspension. However, neither NRS 78.180 nor NRS 78.751 appear to confer absolute immunity against tort liability upon a corporate official, as Mr. Dahlstrom suggests in furtherance of his theory that because Centennial was a revived Utah corporation at the time of the quitclaim deed transaction and therefore Centennial's officials are immunized from all liability flowing from their tortious acts, Mr. Dahlstrom cites NRCP 17(b) for the proposition that Utah law governs the capacity of Centennial to be sued in Nevada. NRCP 17(b) provides that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless a statute of Nevada provides to the contrary. Id. A foreign corporation's right to maintain or defend a lawsuit is

subject to NRCP 17(b) and NRS 80.210(1). *Bader Enter., Inc. v. Olsen*, 98 Nev. 381, 384, 649 P.2d 1369 (1982). NRS 80.210 provides that a corporation which does not comply with the rules regarding qualifications of foreign corporations to do business in Nevada (NRS 80.010 -.040) shall not be allowed to maintain or defend an action in Nevada. *Id*. Corporations may sue and be sued in all courts, in like manner as individuals. Nev. Const. Art. 8, §5. Based on the foregoing, there does not appear to be any doubt that Centennial's capacity to maintain or defend an action in Nevada is determined by Nevada law. The alleged relationship between the capacity of Centennial to be in a Nevada courtroom and Mr. Dahlstrom's proposed immunity as a corporate officer from the results of his tortious act is not clear.

In summary, Mr. Dahlstrom is not shielded or immunized from the results of his tortious acts simply because Centennial was a revived corporation and that upon reinstatement the corporation was authorized to once again exercise its corporate privileges and immunities and transact business as if the suspension had not occurred. Nevada law specifically prohibits absolute immunization of corporate officials from tort liability. He is, then, subject to the judgment as being jointly and severally liable with the other defendants. It appears that Mr. Dahlstrom has the right to apply to this court for indemnity from Centennial.

2. **False representations made at the trial by Placer, the prevailing party, as to Mr. Dahlstrom's assets and earnings after April 18, 1986, amount to misconduct by the prevailing party.**

Mr. Dahlstrom believes that Mr. Haase falsely represented to the court that bankruptcy court records indicated that Mr. Dahlstrom's estate was valued at $15 million, that he owned a home worth $11.5 million and that he was earning about $1 million per year. Mr. Dahlstrom submits documents showing that he is under a Chapter 11 reorganization plan, that all his assets are subject to sale, and that in 1986 his income was

$93,977 and in 1987, $135,000. He believes that Mr. Haase's actions amounted to misconduct.

Placer opposes this by saying that it had bankruptcy court documents on which its representations were based; that Mr. Dahlstrom refused to supply financial information; that the documents had just been received from the bankruptcy court and were the best information available at the time pertaining to Mr. Dahlstrom's financial condition; that the information was not offered as evidence, and the information is not included in the judgment. Placer submitted copies of the disputed documents upon which the representations were made in their opposition. Placer also offers an excerpt from the trial transcript relevant to the disputed information showing that Mr. Haase recognized that the information was not being offered as evidence; that he had been unable to get certified copies of all the bankruptcy records; that lie had no information on defendant Mr. Wood's financial condition; and that the court should award punitive damages without full knowledge of defendants' financial conditions.

SCR 172 says that "a lawyer shall not knowingly make a false statement of material fact or law to a tribunal," or offer evidence that the lawyer knows to be false. SCR 173 provides that a lawyer shall not falsify evidence, or, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

From a careful examination of the record, the court concludes that Mr. Dahlstrom's contentions in this regard are frivolous and entirely without merit. If the records obtained from the bankruptcy court were incomplete, or erroneous, failure to correct must be attributable to Mr. Dahlstrom who failed to comply with a discovery demand to produce his records.

As will be shown below, in greater detail, the bankruptcy records were not relied upon in reaching the decision ultimately rendered. Mr. Haase carefully limited his offer in a manner consistent with the cannons of professional ethics.

3. The court erred in awarding attorney's fees.

Mr. Dahlstrom sets forth the following reasons why the award of attorney's fees was improper:

(1) Award of attorney's fees governed by NRS 18.010, which allows the award of attorney fees only under certain circumstances.

(2) The judgment states the award was based upon the defendants' intentional trespass and slander of title. This reason does not fall within the limits of NRS 18.010, therefore, the award was in error.

Plaintiff opposes those points by saying that Nevada cases provide for an award of attorney fees where not specifically statutorily authorized; that Nevada cases allow for attorney's fees in cases of injunctive proceedings; and that plaintiff's complaint prayed for injunctive relief.

It is well established in Nevada that attorney's fees cannot be recovered unless authorized by agreement or by statute or rule. *Young v. Nevada Title Co*, 103 Nev. 436, 442, 744 P.2d 902 (1987). Cf. *Sun Realty v. District Court*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975); *Schouweiler v. Yancy Co.*, 101 Nev. 827, 712 P.2d 786 (1985); *Guild & Hagen v. First Nat'l Bank of Nevada*, 95 Nev. 621, 622, 600 P.2d 238 (1979). It has long been the rule in Nevada that attorney's fees may be recoverable in wrongful injunction or wrongful attachment cases. *Artistic Hairdressers Inc. v. Levy*, 87 Nev. 313, 316, 486 P.2d 482 (1971); cf. *Glens Falls Insur. Co. v. First Nat'l Bank*, 83 Nev. 196, 427 P.2d 1 (1967); *McIntosh v. Knox*, 40 Nev. 403, 165 P. 337 (1917); *Fed. Musicians v. Reno's Riverside*, 86 Nev. 695, 475 P.2d 220 (1970); *Lander Co. Comm. v. Cirac*, 98 Nev. 57, 59, 639 P.2d 538 (1982) (We have previously held that attorney's fees may be awarded as damages in a suit for injunctive relief when properly pleaded and proved.) These awards are provided for by NRCP 65(c). In

cases where plaintiff seeks declaratory or other non-monetary relief, attorney's fees may not-be awarded. *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902 (1987); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970); *International Indus. v. United Mtg. Co.*, 96 Nev. 150, 606 P.2d 163 (1980). Where equitable relief is sought an award of attorney's fees is proper if awarded as an item of damages. *Von Ehrensmann v. Lee*, 98 Nev. 335, 338, 647 P.2d 377 (1982); *City of Las Vegas v. Cragin industries* 86 Nev. 933, 478 P.2d 585 (1970).

NRS 18.010(2) provides that, in addition to cases where attorney's fees are authorized by specific statute, the court may make in allowance of attorney's fees to a prevailing party when the prevailing party has not recovered more than $20,000, or, when the court finds that the defense of the opposing party was brought without reasonable ground, or to harass the prevailing party. The award of attorney's fees under the statute is discretionary. *Id.*

An award of attorney's fees under NRS 18.010, where the prevailing party did not receive more than $20,000, was not an abuse of discretion where district court enunciated its reasons for the award. *Farmers Insur. Exch. v. Pickering*, 104 Adv. Op. 104, 765 P.2d 181 (1988). An award of attorney's fees in a case where the prevailing party recovered more than $20,000 was upheld where the district court reasoned that a finding of bad faith against an insurance company was at least tantamount to finding that the insurance company's defense was maintained without reasonable ground. *Farmers Home Mutual Insur. Co. v. Fiscus*, 102 Nev. 371, 376, 725 P.2d 234 (1986). In addition, the insurance company was ordered to pay the prevailing respondents' attorney's fees on appeal. *Id.* at 377.

The judgment, as a conclusion of law, states that the Top Top Top claims were located in bad faith, and that the defendants acted knowingly and deliberately in flagrant violation of the mining laws, in claiming that the Top Top Top claims were valid

and that the Top claims were invalid. The judgment, as a further conclusion of law, states that the trespass and slander of title conduct of the defendants began and continued willfully, knowingly, maliciously, and oppressively. These conclusions of law are sufficient grounds for the court to conclude that Dahlstrom's defense was maintained without reasonable grounds and provide justification for the award of attorney's fees. Cf. *Farmers Home Mutual Insur. Co. v. Fiscus, supra.* The court has justified this discretionary award with lengthy findings of fact and conclusions of law and has set forth sufficient reasons for making the award so as to meet the "sufficient reasons" rule in Farmers *Insurance Exch. v. Pickering*, 104 Adv. Op. 104, 765 P.2d at 182.

The judgment cites two cases for the proposition that the court, "sitting in equity as it does in all actions of this nature, has the power to award attorney's fees-in its discretion as specific damages." Judgment, p. 31. Mr. Dahlstrom disagrees, saying that the two cases do not support such a conclusion. The two cases are Lander *County Comm. v. Cirac*, 98 Nev. 57, 639 P.2d 538 (1982), and, *Artistic Hairdressers, Inc., v. Levy*, 87 Nev. 313, 486 P.2d 482 (1971).

In *Lander Co.*, the Court reversed a lower court award of attorney's fees to a citizen/tax payer who successfully obtained an injunction against the county commissioners. The court upheld the general rule that "attorney's fees may be awarded as damages in a suit for injunctive relief when properly pleaded and proved," Lander Co., 98 Nev. at 59, but disallowed the award in these circumstances where the commissioners, acting without any suggestion of malice, oppression in office, willful misconduct, bad faith, or corrupt motivation, were exercising their best judgment and should not be punished for so doing. id. at 60.

In *Artistic Hairdressers*, the Court upheld an award of attorney's fees to a party who was wrongfully enjoined. The Court upheld the award under NRCP 65(c) which provides for the payment of damages to a party who is found to have been wrongfully enjoined or restrained, if the fees are directly

related to the dissolution of the wrongful injunction. *Artistic Hairdressers*, 87 Nev. at 315.

Placer, in its opposition, cite *Lander Co.*, *Artistic Hairdressers*, and three additional cases for the proposition "that Placer should be awarded. attorney's fees incurred as a result of the trespass and the necessity of obtaining injunctive relief." Opposition, p. 7, 11. 6-12. In *Amer. Fed. Musicians v. Reno's Riverside*, 86 Nev. 695, 475 P.2d 220 (1970), the Court struck an award of attorney's fees to the hotel after 12 the hotel had obtained a restraining order against the musicians and successfully litigated the issue of whether the new hotel liable for musicians' fees unpaid by the previous owner. The Court disallowed the award because the successful litigants were awarded more than $3,000 in compensatory damages, the limit under the statute at that time above which the court could not make a discretionary award of attorney's fees. *Id*. at 699.

In *Glens Falls Insur. Co., Inc. v. First Nat'l Bank*, 83 Nev. 196, 427 P.2d 1 (1967), the court upheld the award of attorney's fees incident to defeating an ex parte restraining order. The amount of the attorney's fees awarded as damages under NRCP 65(c) was discretionary with the trial court. *Id*. at 199.

McIntosh v. Knox, 40 Nev. 403, 165 P. 337 (1917), is a wrongful attachment suit wherein attorney's fees were awarded to the party whose property had been wrongfully attached. The Court said that "the great weigh of authority holds that such an expense [attorney's fees incurred in defending the attachment proceedings is an item of damage ... [W]e think the courts are amply justified in holding that attorney's fees should be allowed in case of a wrongful attachment." *Id*. at 412-413.

There are other cases upholding the proposition that in Nevada attorney's fees may be awarded as damages in equity suits where no other damages are awarded, if the fees are pleaded as damages. *In Von Ehrensmann v. Lee*, 98 Nev. 335,

647 P.2d 377 (1982), the Court held that in an action for specific performance of a real estate transaction attorney's fees were improperly awarded to the prevailing party, but the award of attorney's fees would have been proper if they had been awarded as compensatory damages incurred as a result of defending the equity suit. *Id.* at 337-338. The Court reiterated the well established *rule* that, "absent an agreement between the parties, attorney's fees may not be awarded unless by statute or rule. Sun *Realty v. District* Court, 91 Nev. 774, 542 P.2d 1072 (1975). *See*, NRS 18.010. *Id.* at 337. The Court then said:

> Where equitable relief is sought, an award of attorney's fees is proper if awarded as an item of damages. *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970). We decline to conclude that the fees are awarded as damages where, as here, the district court has not specified the award as such nor has the respondent counterclaimed for damages. *Id.* at-338.

Thus, the Court makes it clear that in an equity situation the prevailing party may be awarded attorney's fees if they are pleaded and awarded as compensatory damages. Cf. *American Fed. Musicians v. Reno's Riverside*, 86 Nev. 695, 699, 475 P.2d 220 (1970); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970).

In slander of title cases, attorney's fees may be awarded as damages if the fees are incurred in removing the cloud of title. *Day v. West Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067 (1985) (In a slander of title action, the district court did not err in exercising its discretion in refusing to award attorney's fees as special damages where special damages weren't proven and proof of special damages is an element of the action for slander of title.); *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982) (In a slander of title action attorney's fees and costs may be awarded as special damages incurred in removing the

cloud of title even if no other special damages resulting from the slander of title are proven.).

In summarizing the general rule in Nevada, attorney's fees cannot be awarded unless authorized by agreement, statute, or rule. Under NRS 18.010(2) the court has discretion to award attorney's fees to the prevailing party when that party has not recovered more than $20,000, or when the opponents' defense was brought without reasonable grounds, or to harass. However, there seems to be an exception to this general rule. In equity cases, attorney's fees may be awarded in wrongful injunction cases if the fees were incurred in an effort to dissolve the injunction (these fees are provided for by NRCP 65(c)), or if attorney's fees are pleaded and awarded as special damages in equity proceedings where no other monetary damages are awarded (wrongful attachment, and specific performance of a real estate contract). In slander of title actions where proof of special damages, including attorney's fees incurred in clearing the cloud on the title, must be shown, attorney's fees may be awarded in addition to punitive damages.

In summary, the attorney's fees awarded to Placer are amply supported by statute and case law, although not under the cited cases. The award was proper under NRS 18.010(2) which allows for the award of attorney's fees to the prevailing party when the opponent's defense was brought without reasonable grounds, or to harass. of course, attorney's fees were not awarded under this statute. They were awarded as damages. The court has authorization in a slander of title action to allow an award of attorney's fees as special damages if the fees were incurred in removing the cloud on the title. The wrongful injunction line of cases does not seem applicable, though, because Placer's attorney's fees were not incurred in dissolving a wrongful injunction brought by Dahlstrom, et al., and, those fees appear to be grounded in NRCP 65(c). Thus, Mr. Dahlstrom was correct in pointing out that the cases cited in the judgment do not seem to be applicable. Except for McIntosh, which is a wrongful attachment case, all the cases set forth by Placer either

in the Judgment or in their opposition in support of an award of attorney's fees are injunction cases. As to McIntosh, the fees awarded in that 1917 wrongful attachment case are now provided for by statute (NRS 31.030(1)).

Accordingly, the court concludes there is no merit to Mr. Dahlstrom's contentions in this regard.

4. The court erred in awarding punitive damages contrary to law.

Mr. Dahlstrom sets forth the following reasons why the award of punitive damages was in error:

(1) The combination of treble compensatory damages and punitive damages is excessive, and is prohibited by the United States and Nevada Constitutions.

(2) There was no basis for treble damages under NRS 40.170, because the damages proven must be to a "thing," and no evidence of any such damages were presented.

(3) Because there was no evidence of Mr. Dahlstrom's financial condition in evidence, no punitive damages may be awarded because no determination of the effect of the award on Mr. Dahlstrom can be made.

(4) There was no evidence of the financial condition of Placer in evidence so that Placer's vulnerability could not be determined.

Placer opposes these points by saying:

(1) Punitive damages are constitutional.

(2) Treble damages under NRS 40.170 are based on all the damages assessed, not on damages to a "thing."

(3) Dahlstrom refused to provide financial information, or appear for trial. The financial annihilation rule in *Ace Truck* does not apply.

(4) There are no cases to support the notion that punitive damages should be based on plaintiff's vulnerability.

Damages Recoverable in a Slander of Title Cause of Action

Slander of title, a tort, occurs when a false and malicious statement, oral or written, is made in disparagement of a person's title to real or personal property, causing injury. 50 Am. Jur.2d Libel and Slander §539. The essential elements of this cause of action are (1) the uttering and publication of the slanderous words, (2) the falsity of the words, (3) malice, and (4) special damages. The action is not for the words spoken, but for the special damages resulting from their utterance or publication. *Id.* at §541. It is generally agreed that recovery may be had only of special damages as distinguished from general damages. *Id.* at §550. Special damages in this instance may be loss of an impending sale or lease, and under proper pleading and proof recovery may be bad for loss of trade, business, or rents, and the necessary expenses, including attorney's fees, incurred in clearing plaintiff's title. However, unless authorized by statute, attorney's fees incurred in prosecuting the case as a whole, as distinguished from those incurred in merely removing the cloud of title, are generally not recoverable as damages or costs. *Id.*, esp. fn. 7.

Although punitive damages are not recoverable as a matter of right in an action for slander of title, they are recoverable if they are justified by the evidence, and if, according to some authorities, actual damages are shown ... [A]s in other cases punitive damages should be in reasonable proportion to actual damages." 50 Am. Jur.2d Libel & Slander §551.

The rule in Nevada appears to be that attorney's fees may be recovered as a discretionary special damages award if the fees were incurred in removing the cloud of title, even if there were

no other damage; incurred such as loss of vendibility of the real estate. *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982); *Day v. West Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067 (1985). Punitive damages may be added under NRS 42.010 when fraud or malice are shown. *Summa*, 98 Nev. at 535.

May Both Statutorily Authorized Multiple Compensatory Damages And Punitive Damages Be Awarded Based on the Same Acts?

The general rule appears to be that if multiple compensatory damages are awarded then punitive damages cannot also be awarded.

> An award of punitive damages resulting from an act that may also result in liability for multiple damages is not allowed, for it would result in double recovery for one wrongful act...It has been said that the imposition of two penalties for the same act violates basic fairness and due process of law, even though the theories behind the causes of action differ ... A statute that limits recovery to three times the actual damages sustained rules out an award of punitive damages by using the words "actual damages", which excludes punitive, vindictive or exemplary damages. 27 Am. Jur.2d Damages §817.

Several state cases are in accord. In *Mohr & Sons, Inc. v. Jahnke*, 198 NW2d 363 (Wisc. 1972), cited by Mr. Dahlstrom, punitive damages for malicious restraint of trade in a treble damages suit were not allowed because two penalties on the same or different theories for the same act violates basic fairness and thus due process of law. Additionally, when a statute creates a cause of action and provides the remedy, the remedy is exclusive. *Id.* at 368. Statutory treble damages, being punitive, will not be construed to include other damages covered by the terms of the statute. *Id.* at 369. The same conclusion was reached in statute Houston, 582 SW2d *Id.* 28 (Ark. 1979),

also cited by Mr. Dahlstrom. The Court said that treble damages for trespass to land under a statute authorizing them are punitive in nature and cannot be awarded along with common law punitive damages where the elements of damage are the same under both theories of recovery because it amounts to a double punitive recovery for the same act. *Id.* at 30-31. Cf. *Bill Terry's Inc. v. Atlantic Motor Sales*, 409 So.2d 507 (Fla. App. 1982) (Treble damages awarded under a federal odometer disclosure law, and punitive damages awarded for the same act, amounted to double recovery and the punitive damage award was not allowed); *His World, Inc. v. Cleto M., Inc.*, 378 A.2d 943 (Pa. Supr. 1977) (In a wrongful distraint suit, punitive damages were disallowed where the statutory remedy providing for double damages was itself punitive in nature.)

Placer does not counter this point in their opposition. Instead, they mischaracterize Mr. Dahlstrom's argument to be that punitive damages are unconstitutional and point out that punitive damages are not unconstitutional. Dahlstrom's argument is, of course, that multiple compensatory damages under a state statute authorizing them *plus* punitive damages based on the same acts amounts to unconstitutional punishment. Mr. Dahlstrom's contention appears to be correct, based on the authorities cited above.

Must the Treble Damages Authorized by NRS 40.170 For Unlawful Entry onto Land Be Based On Actual Damage to the Land Itself or May Attorney's Fees Awarded as Damages be Trebled?

NRS 40.170 provides that, in the case of unlawful entry onto real property, "judgment may be entered for three times the amount at which the actual damages are assessed." *Id.*

There is only one annotated case following this statute in Chapter 40. In *Glock v. Elges*, 39 Nev. 415, 159 P. 629 (1916), actual damages consisted of destruction of a building for which a jury awarded $236 and the judgment specifically disallowed

costs. on appeal, costs were allowed to the prevailing party under a statute so allowing, but the trial court's discretionary decision not to allow treble damages for actual damages was upheld. (Emphasis added). Id. at 422. Apparently the *Glock* court considered only actual damages (for the building) as being amenable, to trebling under the statute, but this point is not entirely clear.

Nevada's statutes provide for multiple damages to be awarded in the following situations involving real property:

--Treble damages for waste committed by a life tenant or a co-tenant, NRS 41.150;

--Treble damages for wrongful cutting of trees, NRS 40.160;

--Treble damages for forcible or unlawful entry in or upon buildings or real property, NRS 40.170;

--Treble damages for wrongful mining, NRS 40.180.

In other states, the treble damages for wrongful cutting of trees appears to be based on the actual damages done to the trees or to the land. In *Lawson v.Helmich*, 146 P.2d 537 (Wash. 1944), actual damages, consisting of the value of certain fruit trees cut down by the trespasser, were trebled under a state statute. *See also Mullally v. Parks*, 190 P.2d 107 (Wash. 1948) which reached a similar conclusion. In *Mullally*, the court said the purpose of treble damages in a trespass with malice case was to punish the offender and to give "a rough measure of compensation for future damages not generally ascertainable." *Id*. at 113. In *Roche v. Casissa*, 316 P.2d 776 (Calif. App. 1957), statutory treble damages in a wrongful tree cutting case were referred to as exemplary damages awarded at the discretion of the court. *Id*. at 778. In *Sparks v. Douglas County*, 695 P.2d 588 (Wash. App. 1985) in another wrongful tree cutting case, the court based the treble damages on the lost production of the apple trees. *See also Short v. Jones*, 613 P.2d 452, 457 (Okla. 1980) (Actual damage to pecan trees amenable to state's treble damages statute.)

The general rule on what damages are recoverable in a trespass action where no actual damages to the land occurred, appears to be that damages may be awarded for inconvenience, invasion of privacy, and for an injury to health or business which is the immediate cause of the trespass.

However, counsel fees and other expenses are not ordinarily recoverable as part of the damages. 87 C.J.S. Trespass §108(b). In *Phillips v. Cordes Towing Service*, 313 P.2d 377 (Wash. 1957), attorney's fees incurred as a result of the removal of Phillips' vehicle from property not owned by Phillips were held not to be recoverable. Only the actual damages resulting from the trespass, the towing charges, were held to be recoverable. In *Loeblich v. Garnier*, 113 So.2d 95, (La. App. 1959), attorney's fees were held non-recoverable in a trespass case.

In *True v. Bosch*, 73 Nev. 270, 317 P.2d 1089 (1957), compensatory damages of $60 and punitive damages of $250 were awarded after a trespasser forcibly invaded her neighbor's yard while claiming an easement. No mention is made of treble compensatory damages under NRS 40.170. In this case, treble compensatory damages would amount to less than actual damages plus the punitive damages awarded.

In summary, while there appears to be no Nevada cases clearly on point, however, *Glock* may fairly be read to allow only *actual* damages to the property or improvements to be amenable to the treble damages allowed by NRS 40.170 in cases of unlawful or forcible entry onto real property or buildings of another. In the other treble damages situations of wrongful tree cutting, and wrongful mining, only actual damages to the land are mentioned as being amenable to the treble damages statutes. In one grazing situation under NRS 568.300, actual damages plus punitives are allowed. Nowhere does it appear that actual damages which can be trebled includes attorney's fees, nor are both treble damages and punitive damages allowed.

Attorney's fees are not generally a recoverable item in trespass actions, 87 C.J.S., supra, unless provided for by statute, therefore they cannot be considered a measure of damages amenable to the treble damages statute.

Apparently, compensatory (actual) and punitive damages, or treble actual damages may be sought in a trespass action, but not treble compensatory *and* punitive damages.

May Punitive Damages Be Assessed Against Dahlstrom Without Any Evidence of Dahlstrom's Financial Condition Being Before The Court?

Mr. Dahlstrom believes that because there was no evidence before the court as to his financial condition that no punitive damages award can be made because the court has no way to determine the effect of the award on him. Mr. Dahlstrom cites *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987) to support this thesis. Placer counters by saying it is Mr. Dahlstrom's fault that there is no such evidence before the court, and that Mr. Dahlstrom has failed to show that the punitive damages award is not within the guidelines set forth in *Ace Truck*.

In *Ace* Truck the "financial annihilation" rule, the "shock the conscience rule" and the "passion and prejudice" rules of appellate review of punitive damages awards are replaced with the following rule:

Punitive damages are legally excessive when the amount of damages awarded is *clearly disproportionate* to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent, or malicious conduct of the tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is *reasonably necessary* and *fairly deserved* in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive. (Emphasis added) *Id.* at 509.

The Court then tells how a reviewing court may arrive at the ultimate judgment of where excessiveness begins:

> [C]ourts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can properly be imposed in a given case. Relevant circumstances include such matters as *the financial position of the defendant*, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offending party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind. (Emphasis added) *Id.* at 510.

A thorough reading of *Ace Truck* reveals no such proposition, as suggested by Mr. Dahlstrom, that "when no such evidence [of Mr. Dahlstrom's financial condition] exists no punitive award can be made because no determination of the effect of such award on the defendant is possible." Motion p. 10, 11. 22-24. Defendant's financial condition is one of several factors to be considered in assessing punitive damages. *Ace Truck*, at 510, *supra*. However, in *Ainsworth v. Combined Ins. Co.*, 104 Adv. Op. 92, 763 P.2d 673 (1988), the court said:

> [W]e note that the financial position of the defendant is still relevant to the determination of the amount of the punitive damage award. The wealth of a defendant is *directly relevant* to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior. (Emphasis added) *Id.* at 6.

This language may well support Dahlstrom's thesis. In *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962), a jury awarded $15,000 in special damages and $30,000 in general damages in a malicious prosecution case plus $50,000 in punitive damages. The

Court ordered a new trial because it considered the special and punitive damages to be excessive.

> Evidence was received relevant to Dr. Miller [the wrongdoer]. His net worth was established to be about $51,000. The jury may have speculated that he had undisclosed assets. If so, it stepped outside the evidence. *Id.* at 310.

This holding seems to support the proposition that punitive damages may not be awarded without the court considering evidence of the financial condition of the defendant. However, the court, in *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 396 P.2d 855 (1964), specifically stated that *Miller* does not support the proposition "that it was error to assess punitive damages without a showing of the financial worth of the defendants against whom they were assessed." *Id.* at 518. The court finally said, "We accept the view of the California court that it is not essential to show defendants' wealth in seeking exemplary damages." *Id.* at 520.

There does appear to be a limitation on the *Hotel Riviera* rule. In *Clark v. Bunker*, 453 F.2d 1006 (9th Cir. 1972) the court upheld a punitive damages award where the total net worth of the defendant was not adduced at trial.

> It was not necessary for the total worth of Bunker to be assessed prior to an award of punitive damages against him. *Hotel Riviera Inc., v. Short*, 80 Nev. 505, 396 P.2d 855, 863 (1964). The award was proper n the absence of evidence showing the likelihood hat the specified amount would destroy Bunker financially. See El Rancho, Inc., v. First National Bank, 406 F.2d 1205, 1218-1219 (9th Cir. 1968). *Id.* at 1012, fn. 11.

In *El Rancho*, a punitive damages award of $225,000 was affirmed. The wrongdoer argued that the award was "manifestly excessive since 'one may be punished without being destroyed.'

Miller v. Schnitzer, 78 Nev. 301, 311, 371 P.2d 824, 829 (1962)." *Id.* at 1218. *The El Rancho* court said, "[the wrongdoer] introduced no evidence showing his ability to pay. Consequently we are in no position to determine what amount of punitive damages will punish him without at the same time destroying him." *Id.*

In summary, the rule in Nevada is that punitive damages may be awarded absent evidence of the wrongdoer's net worth as long as there is no evidence that the award will financially destroy the wrongdoer.

Must the Court Consider the Vulnerability of the Plaintiff in Determining the Amount of Punitive Damages to be Awarded?

Mr. Dahlstrom further asserts with no supporting authorities, the proposition that the court must consider the financial condition of Placer so that Placer's vulnerability (to the acts of Dahlstrom) may be determined and considered by the court. Placer opposes this by saying that "'there are no Nevada cases which hold that the award of punitive damages should be established by the plaintiff's financial condition," and cites *Ace Truck:* "Because the purpose of punitive damages is to punish and deter, the courts in examining these awards should focus on the character of defendants conduct," rather than on the injury suffered by the plaintiff. *Id.* at 506.

In *Ainsworth, supra*, in affirming a $5.939 million punitive damages award against an insurance company, which amounted to 0.4% of its total assets, the court did consider "the vulnerability of, and injury suffered by, the offended party," and noted that Ainsworth, the offended party, was "in a highly vulnerable position as the result of the devastating consequences of his stroke" and that he was "permanently impaired in his speaking ability by the lack of crucial funds to pay for speech therapy at the proper time during his recovery." *Id.* at 7.

Because the insurance company withheld benefits it should have paid he did not get the proper treatment, suffered a permanent speech impairment because of it, and then bad to rely on his wife to fight the insurance company. This was "the injury suffered by the offended party" which the court considered.

Ainsworth's "vulnerability" was only one of five factors the court considered in affirming the judgment, the others being (1) the financial position of the defendant; (2) the culpability and blameworthiness of the offending party; (3) the offensiveness of the punished conduct when compared to societal values of justice and propriety; and (4) the effect of the award as a means to deter future misconduct. *Id.* at 6-7. *See also, United Fire Insur. Co. v. McClelland*, 105 Adv. Op. 100 (Sept. 6, 1989). Of these five factors, four focus on "the character of defendants conduct," *Ace Truck*, at 506, or the deterrence factor. *Ainsworth* allows an awarding court to consider the overall effect of the offending actions on the offended party, but does not indicate that the offended party's "vulnerability" is to be given more weight than the long-established factors of punishment and deterrence. A fair reading of *Ainsworth* would seem, to indicate that plaintiff's vulnerability should be weighed when the offending party is in a superior financial position relative to the offended party, i.e., be viewed as an aggravating circumstance, not be viewed as a mitigating circumstance in a situation where, as here, the offended party is in a superior financial position relative to the offending party.

In summary, the court concludes that both punitive and treble compensatory damages may not be awarded for the same acts.

5. The Findings of Fact are contrary to the evidence.

(A) The date the Top Top Top boundary monuments were erected was misrepresented by Placer.

Mr. Dahlstrom disputes Placer's Exhibit 42, an air photo taken on October 24, 1985, purporting to be the date on which

boundary monuments were erected. Dahlstrom then refers to the location certificates showing the location date as August 26, 1985. Dahlstrom believes this shows an error of fact.

Placer opposes this by referring to Arnold Wood's deposition published at the trial in which Wood said he erected most of the corner monuments on October 24, 1985.

Mr. Dahlstrom appears to be confusing the act of locating a claim and the act of cornering the claim. There is no error of fact here, since there is a 60 day grace period after location of a claim to erect the corner monuments. NRS 517.030.

(B) **The absence of any allocation of costs among the different defendants was an error of fact.**

Mr. Dahlstrom believes it was error to allocate all damages to Mr. Dahlstrom's acts and not those of other defendants, and that it was error to assess costs incurred on other claims not in conflict with the Top Top Top claims, and costs involved in the two boundary agreements.

Placer opposes this by saying that Mr. Dahlstrom should have appeared at trial to present contrary evidence; that all defendants are jointly and severally liable; and that Mr. Dahlstrom has not shown that the court erred in the way it awarded damages.

As set forth above, Mr. Dahlstrom may seek reimbursement from his co-defendants, however, he presented no evidence that he is less culpable than the other defendants.

Other contentions in this regard have been considered and determined to be without merit.

6. **Defendants could not obtain transcripts of the two summary judgment hearings for review by prospective counsel.**

Mr. Dahlstrom says he made a reasonable effort to obtain new counsel after the withdrawal of John Muije and that by the time he ordered transcripts he found out he would not be able to get them in time. Therefore, his prospective new counsel was not able to prepare for the trial. Mr. Dahlstrom moved for a continuance and to strike the trial setting, which were denied.

Placer opposes these points by noting that Mr. Dahlstrom has twice before presented this argument and the court determined that the transcripts were not necessary for the decision, and, Mr. Dahlstrom waited too long to request the transcripts.

Mr. Dahlstrom cites *Maur (sic, Maier) v. Orr*, 758 F.2d 1578 (Fed. Cir. 1985), for the proposition that Dahlstrom's new counsel was precluded by the holding in *Maier* from accepting employment without being thoroughly familiar with the case (which they wouldn't be without the transcripts). A careful reading of Maier indicates that it deals with a frivolous motion for a rehearing upon the suggestion that a judge should have recused himself in a hearing involving the Air Force when the judge was erroneously thought by counsel to be a reserve Air Force officer. There appears to be nothing in *Maier* to support Mr. Dahlstrom' s proposition.

Mr. Dahlstrom first ordered the transcripts on February 17, 1989. John Muije withdrew on August 19, 1988. The transcripts were received on June 1, 1989. The trial was held on April 17, 1989.

This contention is therefore rejected as being without merit.

7. **The court erred in granting Summary Judgment.**

Mr. Dahlstrom has added nothing to his; previous opposition to the motion for summary judgment. Having considered those grounds previously, there is no basis for reconsideration of the decision heretofore ordered.

Mr. Dahlstrom's other two grounds for relief have been considered and found to be without merit.

Conclusion

In view of the foregoing the court concludes and orders as follows:

Mr. Dahlstrom's motion for a new trial be, and is, denied.

Mr. Dahlstrom's motion to modify the judgment be, and is, granted, as follows:

Compensatory damages, including attorney's fees, awarded for the reasons set forth above, shall remain undisturbed by this order.

Treble damages for trespass shall be deleted from the judgment since such damages are punitive in nature.

Finally, the award of punitive damages shall remain undisturbed. In doing so, the court concludes that the defendants' conduct, under the facts present here, in "jumping" the plaintiff's, claims was flagrant, malicious, oppressive and done with conscious disregard to the plaintiff's property rights. When all of the facts were discovered, after substantial effort and expense to Placer, defendants continued to assert frivolous and fraudulent defenses. These facts were known to the defendants or could have been discovered by the exercise of reasonable diligence as they were by Placer's agents and attorneys. After having been exposed, this court was not surprised by the defendants' failure to appear for trial. As a trial tactic, their absence at the trial may have been calculated strategy since a jury may have awarded even greater punitive damages than this court awarded, in view of the callousness of the defendants' conduct, the lack of any merit to their purported defenses, and their assertions of having performed assessment work when it would have been impossible for them to do so

lawfully. Such defenses must be characterized as a sham or a fraud.; a public trial would have exposed them as such. Under such circumstances, if any error occurred in the assessment of punitive damages, it may exist in the inadequacy of the punitive damages award in view of the callousness of the conduct of the defendants and some of their previous associates. It is unfortunate that this court lacks authority to extend the damages award to others who may have been equally or more culpable but were not before the court.

Counsel for Placer is requested to prepare an Amended Judgment consistent with this order. In view of the most recent Nevada Supreme Court decision, i.e., *Ramada Inns v. Sharp*, 101 Nev. 824, 711 P.2d 1 (1985), no prejudgment interest on punitive damages may accrue.

DATED this 16th day of October, 1989.

/S/ William P. Beko
DISTRICT JUDGE PRESIDING

APPENDIX D

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WHITE PINE

PLACER U.S. INC., a California
corporation, (formerly known
as Placer Amex, Inc.),

Plaintiff,

No. 13022

V.

EDWARD R.WAGNER, et al.,

Defendants.

FINDINGS OF FACT CONCLUSIONS
OF LAW AND JUDGMENT

CASE PROCEEDINGS

This quiet title action was filed by Placer U.S. Inc. (the name of which is now Placer Dome U.S. Inc., and is hereinafter referred to as "Placer") on February 4, 1985. The action seeks quiet title to the locatable minerals into the ground covered by the unpatented Top 1 through 4 lode mining claims as well as other unpatented mining claims owned by Placer, all of which are identified in Exhibit A attached to this Judgment (the "Top Claims"). In the First Amended Complaint, Placer also sought compensation for damages resulting from the trespass and slander of Placer's title to said minerals and mining claims committed by Defendants Centennial, Inc. ("Centennial"), Action Mining Company Inc. ("Action") , John A. Dahlstrom ("Dahlstrom") and Arnold C. Wood ("Wood") (collectively said Defendants are referred to as the "1985 Defendants" because that is the year in which their mining claims were staked). The

First Amended Complaint also sought an award of punitive damages against the 1985 Defendants. Centennial filed a counterclaim alleging that Placer has mined and continues to wrongfully mine the Bald Mountain Mine, causing Centennial damages in excess of $100,000,000.

First Motion For Partial Summary Judgment. on July 28, 1987, Placer filed a motion for partial summary judgment on the issues of the validity of the Top Claims and Placer's title to the ground at issue, preserving the issues of damages for a subsequent hearing. The First Motion was supported by 41 exhibits. The 1985 Defendants opposed the First Motion on the grounds that certain mining claims located in 1940,, known as the Pioneer mining claims, were still valid at the time of location of the Top Claims on May 22, 1974 and thereafter, and as a result, the Top Claims were invalid. The 1985 Defendants did not offer any evidence in support of their opposition. The 1985 Defendants claimed that the Pioneer Claims were valid until Placer, which had obtained a quitclaim deed to the Pioneer Claims from other defendants now dismissed from this action, recorded a notice of abandonment of the Pioneer Claims on May 9, 1985. The notice of abandonment stated that the Pioneer claims had been abandoned sometime prior to May 22, 1974. The 1985 Defendants argued that, because the Pioneer Claims were valid until May, 1985, the ground covered by them became open to location upon abandonment in 1985, and therefore the Top Top Top Claims ("Top Top Top Claims") located by wood and Action on August 26, 1985 held title to the Bald Mountain Mine. After a hearing, the Court determined that, while Placer's Top. Claims were valid on paper, there remained a genuine issue of material fact as to whether the Pioneer claims were still valid at the time of location of the Top Claims. Accordingly, the First motion was denied on December 23, 1987. Proceedings Following Denial Of First Motion. After denial of the First Motion, Placer moved f or a bifurcated trial to limit Defendants' right to discover propriety and confidential information concerning the exploration, development, and mining of Placer's mine on the Top Claims (the "Bald Mountain Mine"). After a

hearing on the motion, this Court determined that such information pertained only to damages and not the determination of title to the ground at issue. At the hearing, the Court also determined the 1985 Defendants were not entitled to the discovery of such information until such time as they were able to show that the Top Top Top Claims were superior to Placer's Top Claims. Accordingly, this action was bifurcated for trial, with the issues of claim validity and the 1985 Defendants' liability for trespass upon and slander of title to the Top Claims scheduled for the first trial and any issues as to damages incurred by Placer or the 1985 Defendants scheduled for a second trial on demand of the 1985 Defendants, after opposition by Placer, the matter was set for trial by jury, the first trial to commence on July 11, 1988 and the second trial to follow in the Fall of 1988.

Second Motion For Summary Judgment. Prior to the first trial, Placer filed its Second Motion for Summary Judgment ("Second Motion"). The Second Motion requested that the court summarily determine that the 1985-Defendants' Top Top Top Claims were invalid and that the 1985 Defendants had trespassed upon and slandered the title to Placer's Top Claims. In support of the Second Motion, Placer offered 5 exhibits in addition to the exhibits supporting the First Motion, including the depositions of Jack Marsh and Robert Hunsaker. The 1985 Defendants opposed the Second Motion on two primary grounds: first, that the Pioneer Claims were still valid at the time Placer's Top Claims were located on May 22, 1974; second, the 1985 Defendants had not had the opportunity to. complete their discovery. The 1985 Defendants did not offer any evidence in support of their opposition. As to the issue of discovery, the Court determined that substantial discovery had been conducted during the twenty months. preceding the filing of the Second Motion, and that none of the discovery which the 1985 Defendants claimed they were missing had to do with the issues of title to the Bald Mountain Mine; rather, the discovery sought by the 1985 Defendants pertained to the determination of damages. Placer's exhibits submitted in support of the Second

Motion demonstrated by overwhelming, clear and convincing evidence that the Pioneer Claims had been abandoned prior to July 1, 1951, that Placer's Top Claims were valid, and that the 1985 Defendants' Top Top Top Claims were invalid. As a result, the Court granted Placer's Second Motion for Partial Summary Judgment on July 14, 1988.

Proceedings Subsequent To The Second Motion. On August 2, 1988, Placer served the 1985 Defendants with discovery requests pertaining to the financial positions and other related matters of the 1985 Defendants. On August 22, 1988, pursuant to a motion opposed only by Placer, this, court entered an order permitting John Muije, counsel for the 1985 Defendants, to withdraw as counsel of record. The 1985 Defendants did not timely respond to Placer's discovery requests, with the result that the Court entered an order on November 14, 1988 compelling the 1985 Defendants to respond to that discovery.

Placer had applied on July 26, 1988 for an early trial date on the damage portion of this action, but because the 1985 Defendants were then without counsel and were subject to an order compelling discovery, the court did not believe an early trial date was appropriate. On November 1, 1988, the Court entered an order setting the damage portion of this action for jury trial commencing on April 17, 1989.

On December 30, 1988, Placer filed a motion for sanctions based upon the 1985 Defendants' failure to provide the requested discovery regarding their respective financial positions. The 1985 Defendants did not oppose the motion for sanctions, and on April 6, 1989 the court granted the motion, withholding relief to the time of trial to determine the extent of prejudice to Placer.

On April 3, 1989, Dahlstrom and Centennial filed motions to continue the scheduled trial of April 17, 1989 on the grounds that (1) Dahlstrom was subject to Chapter 11 bankruptcy

proceedings before the Bankruptcy Court of the United States District Court for the District of Utah in Salt Lake City, Utah, and (2) the 1985 Defendants had been unable to secure copies of the transcripts of the two summary judgment hearings which he claimed were needed to enable him and the other 1985 Defendants to secure new counsel. Placer opposed the motion to continue. On April 14, 1989, Dahlstrom filed a motion to strike the trial setting and for leave to file a motion to disqualify the presiding judge. Twenty minutes before the jury trial was to commence on April 17, Wood and Action filed a near-duplicate of Dahlstrom's motion to strike and for leave to disqualify the presiding judge. Placer opposed these motions.

During a recess taken between 10:15 and 11:00 a.m. on the scheduled opening day of trial, the Court held a hearing on all of the 1985 Defendants' pending motions. As noted below, the 1985 Defendants failed to appear for trial and were not present at the hearing. Dahlstrom's motion to continue and the 1985 Defendants' motions to strike the trial setting and for leave to file a motion to disqualify the presiding judge were denied for the reasons set forth in the order entered at the end of the hearing.

The Damage Trial. None of the 1985 Defendants appeared the jury trial on April 17, 1989. Shortly after 10:00 a.m., the court excused the jury venire panel until 11:00 a.m. on the morning of the trial to allow the 1985 Defendants the opportunity to appear in the event some unforeseeable event had prevented them from timely appearing for trial or otherwise notifying the Court. At 11:00 a.m. on April 17, the proceedings were reconvened and the 1985 Defendants still had not appeared or contacted the Court with respect to their absence. Because the jury venire had appeared only because of the 1985 Defendants' demand for a jury, and because Placer did not object to the dismissal of the jury, the Court dismissed the jury venire and ordered that the damage trial would commence at 1:15 p.m. to be heard by the Court. At the damage portion of the trial, the Court received into evidence 78 exhibits offered on

behalf of Placer, together with the testimony of Richard W. Harris, David Parker, David S. Smith, and, by publication of deposition, Arnold C. Wood. The Court had previously received into evidence in connection with the First Motion and Second Motion the deposition testimony of Defendant Wood, Jack Boundy, Defendant Dahlstrom, Jack Marsh, and Robert Hunsaker. Based upon that evidence, none of which was objected to by Placer or the 1985 Defendants, the Court made the following findings of fact and conclusions of law and entered the judgment set forth below.

FINDINGS OF FACT

1. **Dahlstrom's Bankruptcy.** Dahlstrom's motion to strike the trial setting was based partially on the fact that Dahlstrom was subject to Chapter 11 proceedings under the federal Bankruptcy Act. Dahlstrom's motion appeared to allege that this case could not proceed against him because of his bankruptcy proceedings. At the April 17, 1989 hearing, it was established by competent evidence that the commencement of Dahlstrom's bankruptcy proceedings predated Dahlstrom's conduct which created his liability in this action.

Therefore, the Court determined the following facts: Dahlstrom's liability in this matter. does not represent an antecedent debt, but was incurred during the. administration of the debtor's estate; Dahlstrom's counsel accepted service of the First Amended Complaint long after Dahlstrom was subject to the bankruptcy proceedings; Dahlstrom personally appeared as the debtor-in-possession at all previous hearings in this action and never raised the issue that the prosecution of this action against him might be barred by the Chapter 11 proceedings; Dahlstrom's rejection of Placer's claim filed in the bankruptcy proceedings alerted the Bankruptcy Court to the pendency of these proceedings and indicated that, the viability of Placer's claim against Dahlstrom should be judged based upon the outcome of this action.

2. **The Pioneer Claims.** The Pioneer Claims were located on April 25, 1940 by Edward R. Wagner ("Wagner") and Joseph G. O'Brien ("O'Brien"), in the same general area as the Top Claims. Shortly thereafter, O'Brien conveyed his interest in the Pioneer Claims to Wagner. On October 26, 1940, Wagner conveyed a one-half interest in the Pioneer Claims to J. K. Luther and Clara Luther, his wife ("Luther"). No annual maintenance filing was made for the year ending July 1, 1941. A Proof of Labor was filed by the locators of the Pioneer Claims for the assessment year ending July 21, 1942; no annual maintenance filing was done for the year ending July 1, 1943. A Notice of Ownership and Suspension of Labor for the Pioneer Claims was filed for the year ending July 1, 1944 by Wagner. On January 29, 1944, Wagner quitclaimed his remaining one-half interest in the Pioneer Claims to the Deer Trail Tungsten Company ("Deer Trail"). Thereafter, for the assessment years ending July 1, 1944 through 1949, Deer Trail, recorded Notices of Ownership and Suspension of Labor for the Pioneer Claims. There is no evidence before the Court of any kind or character tending to show the existence of a "discovery" of a valuable mineral deposit on the Pioneer claims or, even if a discovery had existed at one time in the 1940's, that it continued to exist after June 30, 1949 (the last date of maintenance of the Pioneer Claims by Deer Trail or Luther).

At all times during Deer Trail's corporate existence, the president of Deer Trail was Arthur DeMelik ("DeMelik") and the only other officers were Wagner and DeMelik's wife, Louise DeMelik. Deer Trail made no corporate filings with the Nevada Secretary of State after 1952, with the result that the corporate charter of Deer Trail was revoked in 1954. No annual assessment affidavits or other filings with respect to the Pioneer Claims were recorded in the White Pine County Recorder's Office after 1949.

In late June, 1951, J. K. Luther notified Charles Kirker ("Kirker") and Jack Marsh ("Marsh") that his partner, Deer Trail, had failed to perform any assessment work after June 30, 1949 on the Pioneer Claims and had abandoned those claims. Luther

advised Kirker and Marsh that he believed the ground was good mineral ground and he proposed that the three of them relocate the area with new mining claims. As a result,' on July 7, 1951, Luther, Kirker, and Marsh located the Copper Dell 1-3, Kennebec 1-3, and the Morrison 1 mining claims ("Marsh Claims") over most of the area previously covered by the Pioneer Claims. The certificates of location for the Marsh Claims were recorded ninety-one days after the location of those claims. The Nevada mining statutes then in effect provided that a mining claim would not be void if a notice of the location "substantially complying" with the statutory requirements was recorded with the county recorder within ninety days after the date of location. 40 Nev. Stat. Ch. 69, p. 92 (March 21, 1941). On July 13, 1951, six days after the location of the Marsh Claims, Messrs. Luther, Kirker and Marsh recorded notices of location for each of the Marsh Claims which substantially complied with the mining statutes. Thus, the requisite notices of the location of the Marsh Claims were timely recorded and the Marsh Claims were validly and properly located in accordance with statutory requirements.

Kirker and Marsh maintained the Marsh Claims (except the Morrison) through September 1, 1962 and timely recorded all the statutorily-required annual assessment affidavits. For several years prior to the abandonment of the Marsh Claims in 1962, they leased the claims to Robert Hunsaker ("Hunsaker"). In 1962, after completing the annual assessment work, Kirker and Marsh determined that they no longer had any desire to maintain the Marsh claims and advised Hunsaker that he could have the ground.

During the 1960's and early 1970's numerous individuals and entities located other unpatented lode mining claims on the ground now occupied by the' Top Claims and previously occupied by the Pioneer Claims and the Marsh Claims. Six Copper Dell claims were located by Hunsaker on the ground at issue on September 1, 1963. The same ground was relocated with a second set of six Copper Dell claims by Fred E. Anderson on May 10, 1964, and a third set of six Copper Dell claims was

located by United States Mining Corp. on July 7, 1965. In addition to the various Copper Dell claims, the CAT 3-12 lode claims were located on a portion of what is the Bald Mountain Mine. The CAT Claims were staked on May 26, 1967, and were abandoned in 1972. On May 17 and 18, 1972, the GATO lode claims were staked on a portion of what is now the Top claims, but the GATO Claims were abandoned before May, 1974. All of these claims were located on the area which the 1985 Defendants allege was the situs of the Pioneer Claims. No one claiming an interest in that ground raised any objections to the staking of the Marsh Claims, the three sets of Copper Dell claims, the CAT Claims, the GATO Claims, or the Top Claims.

After 1949, no other documents pertaining to the Pioneer Claims were recorded with the White Pine County Recorder's office until 1976, when Gregory Chachas ("Chachas") recorded two maps of the Pioneer Claims. In 1965, Chachas allegedly obtained a deed to the Pioneer Claims from a Nick Diskos, although the authenticity of Diskos' signature and date of issuance of that deed remains undetermined. Although the deed states that Diskos was acting as president of Deer Trail in executing the deed to Chachas, there is no public or other record showing a relationship between Diskos and Deer Trail. The deed is dated eleven years after Deer Trail's charter had been revoked. The Diskos deed was not recorded by Chachas until October 30, 1984, after Placer had publicly announced it would develop the Bald Mountain Mine.

After the 1976 maps, the next public filing of a document for the Pioneer Claims was recorded in September 1980, when Chachas recorded a proof of labor for the Pioneer Claims for the assessment year ending September 1, 1980. On March 27, 1985, after the commencement of this action, Chachas recorded with the White Pine County Recorder Proofs of Labor for the assessment years ending 1973, 1974, 1977, 1978 and 1979. These Proofs of Labor were signed by John Boundy. Boundy did not sign some of the affidavits until March, 1985. Further, the Boundy affidavits which were recorded contained false

information as to what work was performed as well as to when such work was performed. Not only did Boundy fail to perform a major portion of the work described in the affidavits, he did not know any of the persons or recognize any of the names of the witnesses who allegedly witnessed his signature on the Proofs of Labor. The affidavits were drafted by Chachas without consultation with Boundy. Boundy has no records to substantiate any of the alleged work. Whether Boundy did any assessment work on the ground covered by the Pioneer Claims cannot be determined.

Chachas and his companies were originally named as defendants in this action because of Chachas' attempt to revive. the long abandoned Pioneer Claims. On May 8, 1985, Chachas and his four corporations (to which he had transferred title) executed a quitclaim deed conveying to Placer all of their right, title and interest in the Pioneer Claims. Because the Pioneer Claims were already invalid long before 1974 (the year of location of the Top 1-4 Claims), the quitclaim deed conveyed nothing. On May 9, 1985, Placer recorded a notice which stated that the Pioneer Claims had been abandoned sometime prior to 1974.

3. The Top Claims. Steven Damele and Edgar Hager, Placer's predecessors in interest, located the Top 1-4 lode claims on may 22, 1974. Certificates of location were recorded in white Pine County on August 9, 1974 and amended certificates of location were recorded on August 31, 1979. Placer timely filed the Top Claims with the Nevada State office of the Bureau of Land Management as required by the Federal Land Policy and Management Act of 1976 (43 U.S.C. §§ 1701 et seq.). Under a joint venture agreement, Placer obtained the. exclusive right to explore, develop and mine the Top Claims in 1975. Placer acquired exclusive title to the Top Claims on February 20, 1986. Damele, Hager, and Placer have complied with all applicable state and federal statutes with respect to the maintenance and development of the Top claims. On December 14, 1980, Placer located the Top 1A-4A mining claims over the Top 1-4 Claims.

The purpose of the relocation was that Placer was not aware of the specific abandonment of the GATO Claims by Cordero Mining Company in 1973, and therefore was concerned that the 1974 location of the Top 1-4 Claims had not been made on open ground. The relocation was made without prejudice to Placer's existing rights under the 'Top 1-4 Claims. The actual abandonment in 1973 of the GATO Claims was admitted by Cordero Mining, Co. by its permitting a default to be entered against it in these proceedings. Because of these facts and the Court's finding that the Top Claims were valid when located in 1974, the Top 1A through 4A lode mining claims are invalid. Since 1975, Placer has expended approximately $12,800,000 in exploring, developing, and mining the Bald Mountain Mine. As a result of Placer's work, it delineated a commercial ore body of approximately 4.1 million tons of ore with an average grade of .076 ounces of gold per ton situate within the Top Claims. During each year from 1974 through 1978, Damele, Hager and Placer have physically occupied the Top Claims at various times of the year. Beginning in 1979, Placer has physically occupied the Top Claims on a full time basis because of its massive exploration and drilling-program of the area. By late Spring, 1985, Placer began to construct a mine haul road for the purpose of hauling ore from the Bald Mountain Mine to the processing facilities approximately four miles to the West. In early August, 1985, pit development of the Bald Mountain Mine began with the removal of overburden from the Top Claims. Throughout this period, Placer received no challenges to or complaints concerning its occupancy, exploration or development of the Top Claims. Placer has been in the process of mining the Bald Mountain Mine since September, 1985.

4. **The Top Top Top Claims**. On August 26, 1985, at the instance of Chachas and allegedly acting as an agent for Defendant Action, Wood located the Top Top Top group of four unpatented lode claims. The Top Top Top Claims were staked over but at an angle to those portions of the Top Claims comprising the Bald Mountain Mine. At the time of location, Wood and Action were well aware of Placer's physical occupancy

of the Bald Mountain Mine. Due to a boundary dispute involving the Top Claims and other mining claims, Wood was retained by Messrs. Bida and Belaustegui in 1984 to survey their GA Claims located adjacent to the Top Claims. While conducting his survey, Wood observed a number of Placer's Top Claim location monuments. He also knew that the purpose of his 1984 surveying work was to help resolve a boundary dispute involving the Top Claims and the GA claims. Additionally, when Wood located the Top Top Top Claims, Wood noted Placer's abundant activity on the Top Claims. Wood observed the extensive evidence on the ground that Placer was just beginning development of the Bald Mountain Mine pit and was just completing construction of a substantial haul road into the middle of the area where Wood located the Top Top Top Claims. Exhibit 42, an air photo admitted into evidence, shows that in the late morning of October 24, 1985, when Wood was erecting the boundary monuments for the Top Top Top Claims, several 50-ton Wabco mine trucks were being loaded by a front end loader and large shovel, one exploration drill rig was operating, and one blast hole drill rig was operating at the Bald Mountain Mine. At the time when the Top Top Top Claims were located, Wood also knew that the sole basis for locating the Top Top Top Claims was a statement by Chachas about the alleged validity of the Pioneer Claims on May 22, 1974. Subsequent to the original acts of location, Action has not possessed or done any work on the Top Top Top Claims.

Action was incorporated in the State of Colorado on September 19, 1985. Although Wood initially denied any association with the Top Top Top Claims other than surveying them, Wood was listed as one of the three original directors. Wood listed a false address in the articles of incorporation of Action. Wood initially knew that he would own an equitable interest in Action. There is no evidence that Action's incorporators, officers, directors or stockholders have ever conducted or operated Action as a corporation. There have never been any officers', directors', or stockholders' meetings, or corporate meetings of any type. There are no stockholder

records and there is no evidence of the filing of any list of officers or directors in Nevada or Colorado. Action has never qualified to do business in the State of Nevada. Soon after the location of the Top Top Top Claims, the other two officers of Action became aware of the facts surrounding Placer's ownership and operation of the Bald Mountain Mine and they resigned and disappeared, leaving the "corporation" to Wood.

Wood and Action were notified of their trespass on Placer's Top Claims in a letter from Placer's counsel dated October 11, 1985. As a result of Wood's inability to finance a defense to Placer's claims of trespass, Chachas arranged with Dahlstrom to have Centennial acquire the Top Top Top Claims from Action. At the time of these arrangements, the corporate charter of Centennial was revoked and Dahlstrom was its last president and director. Partially because an involuntary petition in bankruptcy had been filed against Dahlstrom in Salt Lake City on April 18, 1986, Dahlstrom arranged for Centennial to take title to the Top Top Top Claims. All of Dahlstrom's and Centennial's negotiations occurred with Chachas. Dahlstrom knew at the time of negotiations with Chachas that Placer was developing a mine in the overstaked area and had commenced this quiet title action. On April 23, 1986, Action conveyed the Top Top Top Claims to Centennial in exchange for 50% of Centennial's stock. Centennial's charter was not reinstated until May 8, 1986. Centennial and Dahlstrom were aware that Placer had stated its intention to spend $75 million in developing the Bald Mountain Mine. Dahlstrom knew before centennial acquired the Top Top Top Claims that the Official Records of White Pine County disclosed that the Top Claims covered the ground at issue at the time the Top Top Top Claims were located. Dahlstrom also knew that a lis pendens filed in this action and describing the ground here at issue by Government survey had been recorded in the official Records of White Pine County. Despite this knowledge, none of the 1985 Defendants contacted Placer to determine the nature of Placer's claim to or possession of the ground at issue. Additionally, and in spite of their knowledge of the pendency of this action, Centennial

commenced an action on May 9, 1986 against Placer in the Nevada federal court sitting in Las Vegas, alleging that Placer was wrongfully mining the Top Top Top Claims and damaging Centennial in an amount in excess of $100,000,000. The complaint in the federal action Was not served on Placer until late summer, 1986.

From mid-October 1985 through the summer of 1986, Placer communicated with the 1985 Defendants on numerous occasions in an effort to have them discontinue their trespass on and slander of title to the Top Claims. The 1985 Defendants refused to abandon or otherwise relinquish the Top Top Top Claims. As a result, Placer filed the First Amended Complaint and served the 1985 Defendants on October 31, 1986.

Wood is a licensed surveyor in the State of Nevada. Wood has a bachelor's degree in geology. Wood worked as a mineral examiner for the Bureau of Land Management from 1959 through 1969. Since 1969, Wood has worked as a consultant in the mining industry with respect to the location and maintenance of mining claims on federal land. Wood is very experienced in title work, the determination of claim validity, and the physical location of pre-existing mining claims on the ground. Wood is well versed in the Mining Act of 1872 (30 U.S.C. §§ 21 et seq.), the Federal Land Policy and Management Act of 1976 (43 U.S.C. §§ 1701 et seq.), and Nevada statutes pertaining to mining claims (Ch. 517).

Dahlstrom is a lawyer who has practiced in Salt Lake City, Utah since 1966. Dahlstrom has a bachelor's degree in accounting, and he specialized in tax law. During his years of practice, Dahlstrom became reasonably well acquainted with the Mining Act of 1872, the Federal Land Policy and Management Act of 1976, and the general principles of mining and real estate law. Dahlstrom was, the chief executive officer of several large corporations, including at least one bank, prior to the time he became involved with the Top Top Top Claims.

The 1985 Defendants located and pursued their alleged rights under the Top Top Top Claims with the singular purpose of trying to extract some monetary advantage from Placer by threatening Placer's rights to the Bald Mountain Mine. The 1985 Defendants engaged in knowing and willful conduct in trespassing upon and slandering the title to the Top Claims. The conduct of the 1985 Defendants in this matter was negligent, careless, deliberate, carried out in bad faith, done with malice towards the rights of Placer, intended to be oppressive to Placer, and committed for the purpose of "shaking down" Placer to obtain some monetary advantage from Placer.

5. **Damages.** As a result of the conduct of the 1985 Defendants with respect to the Bald Mountain Mine, Placer has incurred substantial general and specific damages. Placer was required to divert a great many man hours of its employees' time from their regular tasks in developing the Bald Mountain Mine or performing other activities for the benefit of Placer. These man hours were required for engineering and surveying work for the purpose of establishing the specific location and extent of the trespass by the 1985 Defendants, determining what effect the trespass would have on the proposed mining operations and pit development of the Bald Mountain Mine, and helping with the prosecution of the action against the 1985 Defendants and defending the counterclaim of Centennial. Placer employees were diverted from their normal work objectives' in the amount of approximately 570 hours as a result of the conduct of the 1985 Defendants. As a result, Placer has lost the value of their wages and salaries, as well as associated fringe benefits and tax payments, solely because and as a direct result of the conduct of the 1985 Defendants. The amount of these damages to Placer as of April 17, 1989 was $11,910.75.

Also as a result of the conduct of the 1985 Defendants with respect to the Bald Mountain Mine, Placer has incurred special damages in the nature of substantial attorney fees and costs specifically required to prosecute the trespass action against the 1985 Defendants and to defend the counterclaim of

Centennial. Placer's attorneys were required to expend in excess of 1200 hours of billable time due to the conduct of the 1985 Defendant's. The hours billed by Placer's attorneys are very reasonable given the nature and extent of services required in this matter due to the conduct of the 1985 Defendants. The hourly rate of $160 and less charged by Placer's attorneys is very reasonable given the work product, experience and qualifications of the counsel performing those services. As of April 15, 1989, attorney fees incurred by Placer solely as a result of the conduct of the 1985 Defendants were $162,014.50 in attorney fees, plus $13,072.69 in costs, for a total of $175,087.19.

6. **Boundary Agreements.** On September 22, 1982, a Boundary Agreement was entered into between Placer, Bida, Belaustegui, and Amselco Minerals, Inc. ("Amselco") as a complete and binding adjudication of the relative rights and priorities between the owners of the Top, GA and Gator claim groups. A copy of the September 22, 1982 Boundary Agreement was attached to the First Amended Complaint as Exhibit B, and is attached to this Judgment as Exhibit B. The September 22, 1982 Boundary Agreement accurately defines the rights and priorities of those parties to the Top, GA and Gator claim groups.

On March 6, 1986 a Boundary Agreement was entered into between Placer, Lyle F. Campbell ("Campbell"), and Amselco, Nerco Metals, Inc. ("Nerco") as a complete and binding adjudication of the relative rights and priorities between the owners of the Top claims and the Sky 1, 2, 4, and 6 claims. The March 6, 1986 Boundary Agreement declares that portion of Placer's Top Fraction which overlies the Alpine claim group to be invalid. A copy of the March 6, 1986 agreement was attached to the First Amended Complaint as Exhibit C, and is attached to this Judgment as Exhibit C. The March 6, 1986 Boundary Agreement accurately defines the rights and priorities of those parties to the Top claims, the Sky 1, 2, 4 and 6 claims, the Top Fraction and Alpine claim group.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. **Dahlstrom's Bankruptcy Proceedings As A Bar.** This Court has concluded that Dahlstrom's participation in this action and the determination of his rights and liabilities herein were sanctioned by the Bankruptcy Court as part of the administration of the Dahlstrom Chapter 11 proceedings. To conclude otherwise would mean that Dahlstrom intentionally committed fraud upon and acted in contempt of this Court by appearing and participating in this action; through pleadings filed by Placer, Dahlstrom was made aware of these possible charges of fraud and contempt with respect to his conduct, but he has nevertheless pursued his allegations regarding the bankruptcy bar to these proceedings Therefore, this Court 'has made the less severe ruling that Dahlstrom's participation in this action was sanctioned by the Bankruptcy Court. The Court assumes that the judgment entered in this action will be given full faith and credit in Dahlstrom's bankruptcy proceedings, as requested in his rejection of Placer's claim in his bankruptcy. The Court further concludes as a matter of law that these proceedings and the judgment entered herein are not barred by Dahlstrom's Chapter 11 bankruptcy action presently pending in the Bankruptcy Court.

2. **The Pioneer claims Were Invalid By July 1, 1951.** The Pioneer Claims were invalid on or before July 1, 1951 for the following reasons:

a. **No Discovery Was Shown To Exist.** There is no evidence before the Court from which the Court could infer the existence of a discovery of valuable minerals on the Pioneer Claims when Luther, Kirker and Marsh located with the Marsh Claims. The discovery of valuable minerals is a necessary element of a valid mining claim under 30 U.S.C. §§ 21 et seq. Until a discovery is made, the ground is not withdrawn from further location. *Lara v. Secretary of the Interior*, 820 F.2d 1535,

1542 (9th Cir. 1987). If a claimant cannot demonstrate a discovery, others may enter peaceably and openly and establish valid claims. *Belk v. Meagher*, 104 U.S. 279 (1881); *Cole v. Ralph*, 252 U.S. 286 (1920).

b. **The Pioneer Claims Were Intentionally Abandoned.** In order to effectuate an abandonment, two elements must appear together. The owner must give up possession of his property as well as have a present intent to abandon it. *Mallet v. Uncle Sam Mining Company*, 1 Nev. 188 at 204-205 (1865); *see also, Crofoot v. Hill*, 74 Nev. 173 (1958) ; *Martin v. Sterner*, 75 Nev. 350 (1959). Through express statements made by Luther, one of the owners of the Pioneer Claims, possession of the Pioneer Claims was relinquished, and the Pioneer Claims were intentionally abandoned, by Deer Trail and Luther prior to July 1, 1951.

c. **The Failure To Perform Assessment Work Causes A Forfeiture Of The Pioneer Claims Due To Intervening Locations.** Once a claim is "valid", it must be maintained annually in order to prevent its forfeiture by others locating the same ground. 30 U.S.C. § 28 requires the owner of a mining claim to perform at least $100.00 worth of labor or improvements on each claim during each assessment year. The statute also states that "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open, to relocation in the same manner as if no location of the same had ever been made, provided that the original locators their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such locations". 30 U.S.C. § 28.

Additionally, the work must be of "such a character as directly tends to develop and protect the claim and facilitate the extraction of minerals." *Great Eastern Mining Inc. v. Metals Corporation of America*, 527 P.2d 112 (N.M. 1974). The purpose of this requirement is to assure that mining claims are diligently developed. Additionally,, although assessment work does not

have to be performed openly, and may be performed below the surface of a claim, (*Mining Company v. Barclay*, 82 F. 554 (C. C. Nev.1897)], if no visible evidence of assessment work exists after years have passed, it is considered evidence that no work was done. *United States v. Mobly*, 45 F.Supp. 407 (D.C. Cal. 1942). The performance of assessment work has been determined to be a condition of the claimant's right to hold the claim. *Wilbur v. United States ex. rel. Krushnic*, 280 U.S. 306 (1930).

There is no evidence that the requisite assessment work was performed on the Pioneer claims after the end of the 1949 assessment year. Therefore, the ground at issue was open to location at the times when the Marsh Claims, the three sets of Copper Dell claims, the CAT Claims, the GATO Claims, and Top Claims were located. The location of these claims, in each instance worked a forfeiture of the Pioneer Claims, assuming they had not been abandoned.

d. **The Pioneer Claims Could Not Be Rejuvenated After Forfeiture**. The location of the Marsh Claims, the-three sets of Copper Dell claims, the CAT Claims, the GATO Claims, and Top Claims at a time when no assessment work was being performed on the Pioneer Claims caused a forfeiture of the Pioneer Claims. 30 U.S.C. § 28. After such forfeiture, the Pioneer Claims could not be brought back into existence by the recommencement of assessment work. *Public Service Company of Oklahoma v. Bleak*, 134 Az. 311, 656 P.2d 600; *Florence-Rae Copper Co. v. Kimbell*, 85 Wash. 162, 147 P. 881 (1915); *Knutson v. Fredlund*, 56 Wash. 634, 106 P. 200 (1910) (1982) ; 2 AMERICAN LAW OF MINING § 8.7H (1960) ; 2 C. Lindley, LINDLEY ON MINES § 651, at 1632-33 (3d ed. 1914).

e. **The Quitclaim Deed To Placer And The Notice Of Abandonment Did Not Reinstate The Pioneer Claims**. The quitclaim from Chachas. and his companies to Placer did not act as a reinstatement of the Pioneer Claims; rather, as standard industry practice, the quitclaim deed effectively eliminated any

claim of Chachas and his companies to the Bald Mountain Mine. Additionally, Placer's notice of abandonment was an effective, customary method of confirming the abandonment of the Pioneer Claims at an earlier date and did not constitute recognition that the Pioneer Claims were valid and subsisting on the date of execution of the notice of abandonment.

3. **The Top Claims Are Valid.** Except as noted below, the Top Claims are valid and subsisting mining claims for the following reasons:

a. **Ground Open To Location On May 22, 1974.** At the time the various Top Claims described in Exhibit A were located, the ground covered by those claims was open to location, with the exception of the Top 1A through 4A Claims. The Top 1A through 4A claims are invalid because at the time of their location the ground was occupied by the valid Top 1 through 4 claims.

b. **Statutory and Regulatory Compliance.** The Top Claims were recorded and filed in accordance with existing statutes and regulations. Nev. Rev. Stat. ch. 517; 30 U.S.C. §§ 21 et seq.; 43 U.S.C. §§ 1701 et seq.

c. **Assessment Work Requirements Complete.** The Top Claims have been maintained in accordance with applicable statutes and regulations, and all requisite filings and recordings have been timely and properly made. Nev. Rev. Stat. ch. 517; 30 U.S.C. §§ 21 et seq.; 43 U.S.C. §§ 1701 et seq.

d. **Discovery on The Bald Mountain Mine.** Placer has demonstrated that the Top Claims comprising the Bald Mountain mine have a discovery. *Castle v. Womble*, 19 L.D. 455 (1894); *United States v. Coleman*, 390 U.S. 599 (1968).

e. **All Mining Claims and Other Rights In Conflict With The Top Claims Are Invalid.** The Top Claims are valid and confer on Placer the superior right to explore for, develop and

mine the valuable minerals contained in, on or under the ground covered by the Top Claims, subject only to the paramount title of the United States.

4. **The Top Top Top claims, Are Invalid.** The Top Top Top Claims are invalid for the following reasons:

a. **Ground Not Open To Location At Time Of Location.** The Top Top Top Claims were located on ground not open to location on August 26, 1985 due to the valid Top Claims. A junior locator can acquire no rights in ground encompassed by a perfected senior location. *Delmonte Mining and Mining Company v. Last Chance Mining and Milling Company*, 171 U.S. 78 at 79 (1898).

b. **The Top Top Top Claims Were Located In Bad Faith.** Wood and Action had specific knowledge of the prior existence of Top Claims and did not make any effort to verify the alleged title deficiencies of the Top Claims upon which they relied in locating the Top Top Top Claims. Where a junior locator has knowledge of the location of a senior location and the present intent of the senior locator to work the ground, the junior locator cannot enter the ground in good faith. *Claybaugh v. Gancarz*, 81 Nev. 64, 398 P.2d 695 (1965) ; accord, *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F.Supp 429 (D.Nev. 1976), affirmed, 605 F.2d 564 (9th Cir. 1977).

5. **Boundary Agreement.** The Boundary Agreement dated September 22, 1982, between Placer, Bida, Belaustegui, and Amselco constitutes a binding adjudication of rights and priorities of the 2 owners of the Top, GA and Gator claim groups.

6. **Boundary Agreement.** The Boundary Agreement dated March 6, 1986, between Placer, Campbell, Amselco and Nerco constitutes a binding adjudication of the rights and priorities of the owners of the Top claims, the Sky 1, 2, 4, and 6 claims, the Top Fraction and Alpine claim group.

7. **Liability Of Wood And Dahlstrom individually.**

a. **Wood Is Individually Liable And Is The Alter Ego Of Action.** At the time Wood located the Top Top Top Claims, Action was not incorporated. Therefore, Wood, as the locator, was the initial party who trespassed upon and slandered the title to the Top Claims. *Jacobson v. Stern*, 96 Nev. 56, 605 P.2d 198 (1980). Because Action has never been treated or operated as a corporation, and because Wood is the only person who acted for and on behalf of Action, Wood is the alter ego of Action. As such, Wood is individually liable for all actions he took allegedly on behalf of Action. *Rowland v. Lepire*, 99 Nev. 308, 662 P.2d 1332 (1983).

b. **Dahlstrom Is Individually Liable.** Because (1) Dahlstrom was the last president and director of Centennial prior to its charter being revoked in January, 1986, and (2) Centennial took title to the Top Top Top Claims on April 23, 1986 at a time when its charter was revoked, Dahlstrom is individually liable for the continuing trespass and slander of title to the Top Claims due to the non-existence of Centennial when Dahlstrom acted. N.R.S. 78.590 et seq.

8. **Conduct Of The 1985 Defendants.**

a. **Intentional Trespass By Wood And Action.** Wood and Action intentionally trespassed upon the Top Claims when they located the Top Top Top Claims.

b. **Intentional Slander Of Title By Wood And Action.** Wood and Action intentionally slandered the title of Placer to the Top Claims, the Bald Mountain Mine,, and the mineral ground covered thereby.

c. **Intentional Continued Trespass And Slander Of Title.** The 1985 Defendants intentionally continued their trespass and slander of title after receiving written notice and

having knowledge of the underlying Top Claims and Placer's possession and working of the same.

d. **Bad Faith.** The 1985 Defendants acted in bad faith in claiming that the Top Top Top Claims were valid, that the Top claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

e. **Negligence.** The 1985 Defendants were negligent in claiming that the Top Top Top Claims were valid, that the Top claims were. invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

f. **Careless.** The 1985 Defendants were careless in claiming that the Top Top Top Claims were valid, that the Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

g. **Malicious.** The 1985 Defendants acted with malice in claiming that the Top Top Top Claims were valid, that the Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

h. **Oppression.** The 1985 Defendants acted oppressively in claiming that the Top Top Top Claims were valid, that the Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

i. **Knowing And Deliberate.** The 1985 Defendants acted knowingly and deliberately, and in flagrant violation of the mining laws, in claiming that the Top Top Top Claims were valid, that the Top Claims were invalid, and that the 1985 Defendants had the exclusive right to the Bald Mountain Mine.

9. **Damages.**

a. **Compensatory Damages.** The purpose of general or compensatory damages is to compensate the injured party for damages actually sustained. *Miller v. Schnitzer*, 78 Nev.

301, 371 P.2d 824 (1962). General damages mean money compensation for loss, damage or injury. *Johnson v. Wells Farqo & Co.*, 6 Nev. 224 (1870) once liability is found, an award of general or compensatory-damages is mandatory. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The trier of the fact is authorized to award such damages as will make the injured party whole for all of the injuries resulting directly from the wrongful and unlawful conduct. *Quigley v. Central Pacific R.R. Co.*, 11 Nev. 350 (1876). Where there is a wilful trespass, the trespasser will be liable for compensation, as damages, for all losses actually sustained as a direct result of the trespass. *Gerlach Livestock an v. Laxalt*, 52 Nev. 191, 284 P. 310 (1930). Accordingly, Placer is entitled to an award of damages for lost employee hours incurred solely as a result of the 1985 Defendants' intentional trespass and slander of title conduct in the amount of $11,910.75.

Additionally,, this Court, sitting-in equity as it does in all actions of this, nature, has the power to award attorney fees in its discretion as specific damages. *Lander County Commissioners v. Cirac*, 98 Nev. 57, 639 P.2d 538 (1982); *Artistic Hairdressers, Inc. v. Levy*, 87 Nev. 313, 486 P.2d 482 (1971) . Accordingly, Placer should receive an award of damages for attorney fees incurred solely as a result of the 1985 Defendants' intentional trespass and slander of title conduct in the amount of $162 014.50.

Courts have uniformly allowed the recovery of the costs incurred by a party in prosecuting a trespass upon or def ending title to real property. *Dalton v. Bowker*, 8 Nev. 190 (1873); *Thomas v. Palmer*, 49 Nev. 438, 248 P. 887 (1926). Therefore, Placer is entitled to an award of damages for costs incurred solely as a result of the 1985 Defendants' intentional trespass and slander of title conduct in the amount of $13,072.69.

b. **Treble Damages For Trespass.** Placer should receive an award of treble the amount of the compensatory

damages described above because the trespass was intentional and was continued with malice and oppression for no other purpose than to obtain some monetary advantage over Placer. N.R.S. 40.170.

e. **Punitive And Exemplary Damages.** Because the trespass and slander of title conduct of the 1985 Defendants began and continued wilfully, knowingly, maliciously, and oppressively, Placer should receive an award of punitive or exemplary damages. 7 N.R.S. 42.010; *Buckley v. Buckley*, 12 Nev. 423 (1877); *Mid-West Supply, Inc. v. Waters*, 89 Nev. 210, 510 P.2d 877 (1973). At the April 17, 1989 trial, it became apparent that Placer had been prejudiced by the 1985 Defendants' failure to respond to the discovery regarding their respective financial positions. As a result of that failure, Placer was unable to submit any evidence regarding the effect a punitive damage award would have on the financial well being of the 1985 Defendants. It would be entirely inappropriate for this Court to withhold the award of punitive damages because the wrongful conduct of the 1985 Defendants prevented the computation of punitive damages relevant to their respective financial positions. However, the Court is mindful of a bill presently being considered by the Nevada Legislature which would limit punitive damage awards to three times all other damages awarded. Accordingly, the punitive damage award which Court otherwise believes is appropriate should be remitted to the amount of $1,000,000.00.

JUDGMENT

Based on the foregoing Findings of Fact, Conclusions of Law, and all of the evidence admitted at the hearings held by the Court and at the damage trial, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Pioneer Claims were invalid on or before July 1, 1951.

2. The Top Claims, as described in Exhibit A attached to this Judgment and incorporated herein, are valid and confer on Placer the superior right to explore for, develop and mine the valuable minerals contained in on or under the ground covered by the Top Claims, subject only to the paramount title of the United States.

3. The Top 1A through 4A Claims are invalid and were void ab initio.

4. The Top Top Top Claims are invalid and were void ab initio.

5. The court recognizes, ratifies, and adopts the Boundary Agreement dated September 22, 1982, between Placer, Bida, Belaustegui, and Amselco (a copy of which is attached hereto as Exhibit B) as being a complete and binding adjudication of the relative rights and priorities between the owners of the Top, GA and Gator claim groups as described in said Boundary Agreement. The Court further finds the rights and obligations of the parties thereunder to constitute a binding legal obligation, and the parties are ordered to comply therewith.

6. The Court recognizes, ratifies, and adopts the Boundary Agreement dated March 6, 1986, between Placer, Campbell, and Amselco and Nerco (a copy of which is attached hereto as Exhibit C) as being a complete and binding adjudication of the relative rights and priorities between the owners of the Top claims, the Sky 1, 2, 4, and 6 claims, the Top Fraction and the Alpine claim group as described in said Boundary Agreement. The Court further finds the rights and duties of the parties thereunder to constitute a binding legal obligation, and the parties are ordered to comply therewith.

7. Placer Dome U.S. Inc. is awarded treble compensatory damages against each of Centennial, Inc.; John A. Dahlstrom; Action Mining Company, Inc.; and Arnold C. Wood, jointly and severally, in the amount of Five Hundred Sixty Thousand Nine Hundred Ninety Three and 92/100 Dollars ($560,993.92), with interest accruing at the rate of twelve percent (12%) per annum from April 17, 1989 until paid.

8. Placer Dome U.S. Inc. is awarded exemplary and punitive damages against each of Centennial,' Inc.; John A. Dahlstrom; Action Mining Company, Inc.; and Arnold C. Wood, jointly and severally, in the amount of One Million Dollars ($1,000,000.00), with interest accruing at the rate of twelve percent (12%) per annum from April 17, 1989 until paid.

9. The Counterclaim of Centennial is dismissed with prejudice.

Dated this 5th day June, 1989.

/s/ William P. Beko
DISTRICT JUDGE

APPENDIX E

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WHITE PINE

PLACER U.S. INC., a California
corporation, (formerly known
as Placer Amex, Inc.),

Plaintiff,

No. 13022

V.

EDWARD R.WAGNER, et al.,

Defendants,

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Summary Judgment must be granted where the moving party is entitled to judgment as a matter of law and no genuine issue remains for trial. While it is true that all evidence favorable to the party against whom summary judgment is sought will be accepted as true, affirmative opposition must set out in affidavit form specific facts, based upon the personal knowledge of the affiant, showing a genuine issue for trial. Lacking the same, plaintiff's second motion for partial summary judgment be, and is granted. The remaining defenses asserted by defendants are determined to be meritless in view of the foregoing.

DATED this 11th day of July, 1988.

/s/ William P. Beko
DISTRICT JUDGE PRESIDING

APPENDIX F

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WHITE PINE

PLACER U.S. INC., a California corporation, (formerly known as Placer Amex, Inc.),

Plaintiff,

No. 13022

V.

EDWARD R.WAGNER; JOSEPH G. O'BRIEN; DEER TRAIL TUNGSTEN CO., a Nevada corporation; ARTHUR DEMELIK; ROBERT F. HUNSAKER; FRED E. ANDERSON; UNITED STATES MINING CORPORATION, a Utah corporation; JOHN C. OSMOND; DANIEL H. MEYER; D. MEYER; J. OSMOND; ESTATE OF DANIEL H. MEYER; JUANITA J. MEYER; JUANITA MEYER BODELL; JUANITA M. BODELL; M. A. KAUFMAN; DONALD K. JENNINGS; CODERO MINING CO., a corporation; ACTION MINING COMPANY, INC., a Colorado corporation; ERNEST D. BLACK; RAYMOND COTTRELL; ARNOLD WOOD, CENTENNIAL, INC., a corporation; JOHN DAHLSTROM; DOES 5-10; BLACK AND WHITE CORPORATIONS 3-10; also any other persons unknown claiming any right, title, lien or interest in the real property described in this Complaint adverse to Plaintiff's ownership or any cloud upon Plaintiff's title thereto,

Defendants.

RULING ON PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

This matter came before the court on September 21, 1987. The Plaintiff and movant, Placer U.S., Inc., a California corporation (formerly known as Placer Amex, Inc.), hereafter "Placer," was represented by M. Craig Haase, Esq., and Richard W. Harris, Esq., of the firm of Haase and Harris, of Reno, and the Defendants, Arnold Wood, Action Mining Company, Inc., Centennial, Inc., and John A. Dahlstrom, hereafter collectively referred to as "Centennial," were represented by John W. Muije, Esq., of the firm of John W. Muije, Ltd., of Las Vegas. By stipulation of counsel, with the concurrence of the court, this matter was heard in Tonopah rather than Ely.

Placer has moved for partial summary judgment declaring void the "Top Top Top" claims of Centennial and dismissing its entire counterclaim. In its motion, Placer contends as follows:

(1) Placer's Top Claims were located on open public domain on May 22, 1974;

(2) Placer has continuously and physically occupied, possessed, and worked the Top Claims for a period of 13 years;

(3) Placer has made a discovery of valuable minerals on the Top Claims;

(4) Centennial and its predecessor, despite actual knowledge of the existence and active development of Placer's Top Claims, nevertheless trespassed on the subject Top Claims and located the Top Top Top Claims in August, 1985; and

(5) Centennial and its predecessor have done nothing on the ground at issue other than erect and paper some of the monuments for the Top Top Top Claims.

Preliminarily, the record of admissible evidence before the court discloses that there is no genuine issue involving Placer's compliance with the law, both state and federal, applicable to the location and maintenance of the Top group

of unpatented lode mining claims, provided that the mining ground included therein was open for mineral entry. Centennial conceded that it has no evidence, and therefore presented none, which would demonstrate that Placer failed to comply with any state or federal laws or regulations in locating and maintaining these claims, if the ground was subject to location. Accordingly, partial summary judgment of this important issue may be entered.

The principal issue of this dispute, however, is whether the mining ground included within the exterior boundaries of the Top group of claims was open and subject to mineral entry at the time it was located by Placer's predecessor in interest. Here, sufficient disputes as to facts exist as to render summary judgment inappropriate.

Any claim either party may make as to the ground in question must rely on the effect earlier claims, known as The Pioneer claims, had on Placer's Top claims. Centennial alleges that the Pioneer claims were valid at the time Placer located the same ground for its Top claims, therefore, the Top claims were invalid. Placer contends that the Pioneer claims had been abandoned prior to the location of the Top claims and that the Top claims are valid. In an effort to clear its title, Placer later acquired quit claim deeds from those parties claiming interests in the Pioneer claims, some of whom are principals in defendant corporations, and filed a declaration of abandonment of the Pioneer claims dated May 9, 1985, but effective May 21, 1974, the day before Placer's Top claims were located. On August 26, 1985, Centennial's predecessor in interest located the Top Top Top claims, alleging that the validity of the Pioneer claims as of May 22, 1974, precluded the validity of the Placer claims; that Placer conceded the validity of the Pioneer claims by its acquisition of quit claim deeds relating to same; and that the ground was therefore open to mineral entry in August, 1985.

Enough documentation has been offered for the record to support an inference for Plaintiff's allegations, yet that in itself

is not enough to warrant a judgment on the invalidity of Centennial's Top Top Top claims or the dismissal of Centennial's counterclaim. Accepting as true all evidence favorable to the party against whom the summary judgment is rendered, *Cladianos v. Coldwell Banker*, 100 Nev. 138, 141, 676 P.2d 804 (1984), *citing Stone v. Mission Bay Mortgage Co.*, 99 Nev. 802, 672 P.2d 629 (1983), that evidence creates sufficient conflicts to present triable issues of facts as to whether the ground in question was open and subject to mineral entry when Placer's Top claims were located. Accordingly, summary judgment is not proper where genuine issues of material fact exist and the moving party is not entitled to a judgment as a matter of law.

IT IS THEREFORE ORDERED that Plaintiff be granted partial summary judgment solely as to compliance with the law in locating and maintaining its Top group of claims.

IT IS ALSO ORDERED that Plaintiff be denied summary judgment as to whether the mining ground included within the exterior boundaries of the Top group of claims was open and subject to mineral entry at the time it was located by Placer's predecessor in interest.

DATED this 18th day of December, 1987.

/s/ William P. Beko
DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 20 1991
OFFICE OF THE CLERK

(2)

No. 91-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CENTENNIAL, a Utah Corporation, JOHN A. DAHLSTROM, and ARNOLD C. WOOD,

Petitioners,

v.

PLACER DOME U.S. INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

The gravamen of the Petition for Writ of Certiorari ("Petition") is that petitioners Dahlstrom, Wood and Centennial (collectively "Petitioners") want this Court to declare generally that exemplary damages are unconstitutional so that Petitioners are relieved from paying the $1 million in exemplary damages awarded against them.

A. Parties.

Contrary to the statement in the Petition, Respondent, Placer Dome U.S. Inc. ("Placer") is ***not*** a wholly owned subsidiary of "Placer Dome Mining"; rather, Placer is a wholly owned subsidiary of Placer Dome Inc., a publicly held corporation. Other related companies are Placer Pacific L., Placer CEGO Petroleum Division, and Prairie Producing Co.

B. Action Below.

1. Synopsis Of Case Proceedings.

A complete and accurate synopsis of the proceedings in this case, up to the time of entry of the Amended Judgment, is set forth in Appendix[1] B at B-1 to B-6.

2. The Reason Petitioners Were Not Parties To Original Quiet Title Complaint.

Although not stated in the Petition, the Court should note that Petitioners were not parties to the original quiet title action because they had not yet jumped Placer's mining claims ("TOP claims"). The TOP claims were the subject of the quiet title action. After Petitioners jumped the TOP claims by locating their "Top Top Top" mining claims and refused to discontinue their trespass, Placer amended the quiet title complaint. The amended complaint included a claim for an award of exemplary damages against Petitioners due to the intentional trespass by and other malicious conduct of Petitioners.

3. Petitioners' Mis-statements Regarding Lack Of Counsel.

At page 5 of the Petition, Petitioners' claim they were prejudiced because they were unable to obtain

[1] All references to "Appendix" refer to the Appendices attached to the Petition.

new counsel in time to represent them at the damage trial. A brief review of the facts will demonstrate the speciousness of this allegation. Placer filed two motions for partial summary judgment. The first motion was granted as to Placer's paper title to the TOP claims but denied as to the validity or invalidity of underlying, prior-existing mining claims. The second motion was granted in July, 1988, and declared that all underlying, prior-existing mining claims were void prior to the date of location of the TOP claims. The summary judgment rulings left only the issues of damages subject to trial. Counsel for Petitioners withdrew on August 22, 1988. On November 1, 1988, the trial court set the damage trial for April 17, 1989. Petitioners did not attempt to obtain new counsel or copies of the transcripts of the summary judgment hearings until mid-February, 1989.

Petitioners claim it was necessary for them to obtain transcripts of the two hearings before new counsel could be selected. This claim is without merit. All of the evidence considered by the trial court in ruling on the motions for summary judgment was set forth in the extensive summary judgment pleadings. The transcripts contain nothing more than counsels' respective oral arguments pertaining to the summary judgment pleadings and supporting documents. Petitioners have never presented any evidence that they were unable to obtain legal representation for the damage trial because they did not timely obtain transcripts of the summary judgment hearings. For these reasons, the trial court denied the Petitioners' untimely-filed motions for continuance of the damage trial.

On the day scheduled for the damage trial, none of the Petitioners appeared or even had the courtesy to advise the trial court that they would not appear. The trial court recessed the commencement of trial for an hour to give Petitioners the opportunity to appear or make their position known to the court. During that time, the entire jury venire panel, Placer's representatives and attorneys, and the court and court personnel were kept waiting. Ultimately the trial court dismissed the jury venire panel and proceeded to bench try the damage portion of the case, *sans* Petitioners. The injuries of which Petitioners complain might have been partially or entirely avoided had the Petitioners simply chose to appear at trial. Petitioner Dahlstrom was a licensed attorney with more than 23 years of private law practice experience at the time, so at least he and Petitioner Centennial would not have been prejudiced by appearing at trial.

C. Factual Summary Of History Of Mining Claims At Issue.

The history of the various mining claims which at one time or another covered the ground encompassed by the TOP claims is set forth in detail in the Amended Judgment. Appendix B at B-9 to B-18. A brief summary of that history follows.

The TOP claims were located in May, 1974. Numerous other mining claim groups had previously occupied the same ground, but as determined in the Amended Judgment each of those claim groups had been abandoned prior to the location of the TOP claims. Placer acquired the right to explore, develop and mine the TOP claims in 1975. As a result of extensive exploration work over the ensuing six years, Placer discovered the existence of a commercial gold

ore body on the TOP claims. After conducting economic feasibility studies in the early 1980's, Placer announced a plan to expend approximately $75 million to develop the TOP claim ore body (also known as the "Bald Mountain Mine"). In 1984, Placer began the announced development by commencing construction of the mine haul road and the mine pit infrastructure.

Because numerous groups of mining claims had previously occupied the same ground as the TOP claims, Placer commenced a quiet title action in February, 1985. By the end of May, 1985, all existing adverse claims had been resolved. Road construction and mine pit development of the TOP claims progressed during the Spring and early Summer of 1985. Actual mining operations on the TOP claims began in late July of 1985. Based upon unfounded speculation of a flaw in Placer's title to the ground, Petitioners located the Top Top Top mining claims in August, 1985, after actual mining operations had commenced. This intentional trespass began these acrimonious proceedings.

SUMMARY OF ARGUMENT

Petitioners argue that their rights to due process of law were violated because there was insufficient evidence of malicious conduct on their part to warrant an award of exemplary damages against them under Nevada law. The record below, as reflected in Appendix B, contains an overwhelming amount of evidence of Petitioners' malicious and oppressive conduct which fully supports the exemplary damage award.

Petitioners claim that the exemplary damage award against them is excessive and therefore a violation of their rights to due process of law under the 14th

Amendment. To reach this conclusion, Petitioners first claim that attorney's fees were not awarded as compensatory damages. The Amended Judgment belies this claim. As a result, the actual ratio of exemplary damages to compensatory damages is approximately 5:1, not the skewed ratio claimed by Petitioners on account of their fictitiously calculated compensatory damages. Petitioners also support their allegation of excessiveness by claiming that the trial court failed to adhere to any standards in determining the amount of exemplary damages. Again, however, the Amended Judgment belies this claim. The trial court listed five specific criteria which the Nevada Supreme Court established for the purpose of enabling the proper determination of exemplary damages. These standards comport with the due process requirements announced by this Court which are requisite in determining damages. The trial court observed each of these criteria, except those not applicable to the circumstances of the case or those which were dependent upon evidence which the Petitioners refused to supply after being ordered to do so.

Petitioners argue that they were not afforded certain rights prior to the entry of judgment and therefore were deprived of their rights to due process of law. The record demonstrates that this argument is factually and legally false because (1) Petitioners received a trial on liability issues in the form of two hearings on two motions for summary judgment, at both of which Petitioners failed to supply any evidence to demonstrate the existence of a genuine issue of material fact; (2) Petitioners did not have the damages against them determined by a jury because Petitioners voluntarily refused to attend the damage

trial; (3) Petitioners' motion to amend the original judgment resulted in an Amended Judgment which reduced the original judgment in excess of $350,000, demonstrating due consideration of Petitioners' claims by the trial court; and (4) Petitioners fully briefed and orally argued their appeal to the Nevada Supreme Court; simply because that court found that their appeal was without merit does not imply that Petitioners were not accorded their due process rights.

ARGUMENT

A. There Is Substantial Evidence Of Malicious Conduct Of Petitioners Sufficient To Support The Award Of Exemplary Damages.

Petitioners allege there is no evidence to support the judgment that Petitioners' trespass was "negligent, careless, deliberate, carried out in bad faith, done with malice towards the rights of Placer and with the intent to be oppressive to Placer." Petition at 6. A review of the relevant portions of the Amended Judgment utterly repudiates this allegation. See Appendix B at B-9 to B-18.

The following is a brief summary of just a portion of Petitioners' malicious conduct. The entire basis for Petitioners' claim to the ground at issue is Petitioners' argument that certain mining claims, known as the Pioneer claims, which were located in 1940 and covered much of the same ground as the TOP claims, were still valid at the time the TOP claims were located. The Petitioners argued that if the Pioneer claims were still valid in May, 1974, the TOP claims were invalid *ab initio*. Concomitantly, if the TOP claims were initially invalid, then the ground covered by the TOP claims was open to new mining claim

locations when the Pioneer claims were later abandoned. Petitioners' argument totally ignores the facts contained in the public record, the testimony of Petitioners' sole percipient witness, and applicable statutory and case law.

At his deposition, Petitioner Dahlstrom testified that Petitioners' claim of seniority of title relied "solely" upon the April 4, 1985 affidavit of Mr. John Boundy. That affidavit indicated that the assessment work was done on the Pioneer mining claims even though no proofs of labor had been recorded for more than thirty years. However, during his deposition, Mr. Boundy admitted that his April 4, 1985 affidavit and two other affidavits[2] were false in many substantive particulars. The three Boundy affidavits do not allege that any assessment work was done between 1950 and 1973. At his deposition, Mr. Boundy was adamant that no assessment work was performed on the Pioneer claims after 1950 until 1973. None of the Boundy affidavits materially complies with federal or state statutory requirements pertaining to assessment work; those affidavits do not (i) identify the value of the labor or improvements allegedly performed, (ii) when the work was done, (iii) to which mining claims the work pertains, (iv) the character of expenditures, labor or improvements, (v) the claim or part of the claim affected by the work, (vi) the year(s) for which the labor was made or the dates made, or (vii) the name of the

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[2] On April 4, 1985, January 2, 1986 and January 15, 1987, a Mr. Gregory Chachas (an originally named defendant in this case) prepared affidavits for Mr. Boundy which contained substantially false information. Mr. Boundy testified that he did not read these affidavits carefully and that he signed them because he relied on Mr. Chachas. Appendix B at B-12 to B-13.

claim owner or the names of the persons who performed the work. Such information is required by N.R.S. 517.230(1) and 30 U.S.C. §28. Furthermore, Mr. Boundy agreed that many of the statements contained in his three affidavits were false. The Boundy affidavits were not recorded within the 60 day statutory period after the work was allegedly performed—indeed, they have never been recorded. Other than the April 5, 1985 Boundy affidavit, Petitioners acknowledged there were no facts known to them which would support the claimed validity of the Pioneer claims as of 1974.

In spite of Petitioner Dahlstrom's deposition statement that some of the alleged annual labor performed by Boundy was "filed as required" by Nevada Statutes, no proofs of labor for the Pioneer claims were recorded in White Pine County for the assessment years ending in 1950 through 1979, until March 27, 1985. These belated recordings were made more than a month after Placer commenced this action. At that time, Mr. Chachas recorded proofs of labor for the years 1973, 1974, 1977, 1978 and 1979. All those proofs of labor were signed by Mr. Boundy. Mr. Boundy did not sign some of those proofs until March, 1985. The proofs contained false information as to what work was performed and when it was performed. Mr. Boundy testified that this false information was made up by Mr. Chachas without consultation with Mr. Boundy. Mr. Boundy did not do some of the work described in those proofs. Although he signed the 1979 proof of labor, Mr. Boundy was not even on the Pioneer claim ground in 1979. Mr. Boundy did not know or recognize any of the names of the "witnesses" who witnessed his signature

on those proofs of labor. Although Mr. Boundy claimed to have performed some assessment work on the Pioneer claims during several of the summers in the mid-1970's, he could not recall who did the work, what work was done, where the work was done, the value of the work, or how any work actually done benefitted or improved any of the Pioneer claims. Petitioners offered no evidence to buttress the inadequate proofs of labor or Mr. Boundy's memory. During the 1950's, 1960's and up until November 1972, Mr. Boundy occasionally prospected the ground covered by the old Pioneer claims without any authorization from anyone and for his own account, thus recognizing the "open to location" status of the area.

In spite of the fact that all of the foregoing information was of record or known by or available to the Petitioners, they continued to pursue their claims to the ground covered by the TOP claims. In essence, Petitioners perpetrated a fraud scheme designed to use false affidavits and factual claims in an effort to oust Placer from the mine which it discovered or to extort money to settle their "claims". It is clear from this and other evidence described in Appendix B that there is no merit to the Petitioners' allegations that there was no evidence before the Trial Court of their negligent, careless, malicious, and oppressive conduct at the time of entry of the Amended Judgment. Accordingly, the Petition does not present this Court with a factual scenario which would support a claim that Petitioners' rights to due process of law were violated by the award of exemplary damages against them.

B. The Exemplary Damages Awarded Against Petitioners Are Not Excessive, Thereby Depriving Petitioners Of Their Rights To Due Process Of Law Under The 14th Amendment To The United States Constitution.

1. The Ratio Of Exemplary Damages To Compensatory Damages Is Approximately 5:1.

One of the several arguments in the Petition is that the $1 million exemplary damage award against Petitioners is so excessive it constitutes an unconstitutional violation of Petitioners' due process rights. This argument is premised on a false factual claim that the Amended Judgment awarded Placer attorney's fees and costs in the amount of $175,087.19. This statement is untrue. The Amended Judgment awards that amount ***as damages*** incurred by Placer as a result of Petitioners' trespass, not as an award of attorney's fees and costs. *See*, Appendix B at bottom of B-35[3]. Both the trial court and the Nevada Supreme Court determined that the attorney's fees and court costs incurred by Placer as a result of the Petitioners' conduct were compensatory "damages" incurred by Placer in the same sense as Placer's loss of its employees' time as a result of the Petitioners' conduct.

Petitioners' prevarication is critical to their argument in Part C.3 of the Petition that the amount of exemplary damages awarded by the trial court is ex-

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[3] The re-printed Amended Judgment contained in Appendix B is erroneous at the bottom of page B-35. The last complete sentence on that page, in the actual Amended Judgment, reads: "Of course, the attorney's fees here were not awarded under this statute; they were awarded as damages." (Emphasis supplied).

cessive because it is such a large multiple of compensatory damages. While Petitioners are correct that $1,000,000 is many times the sum of $11,910, that is not the amount of compensatory damages awarded in the Amended Judgment. Rather, if a compensatory/exemplary damage comparison is to be made, the correct amounts are $1 Million to $186,997, a ratio of barely more than 5:1. Placer has not been able to find any judicial authority in the United States which has found such an award ratio "excessive", at least in the constitutional sense, and Petitioners have cited none.

2. The Criteria Not Considered By The Trial Court In Determining Exemplary Damages Were Not Necessary To Provide Petitioners Any Rights Under The 14th Amendment To The United States Constitution.

The trial judge carefully limited the amount of exemplary damages he awarded, making the following statement:

> "As counsel are aware, there's been a great deal of discussion about caps on punitive damages in certain types of tortious conduct in the state of Nevada. I am mindful of the concern for that. But I am also mindful of the reason why punitive damages should be awarded in cases such as this where there has been a flagrant and malicious violation of the rights of others." Transcript of April 17, 1989 Trial at 64.

The Nevada Supreme Court, in affirming the trial court's exemplary damage award, was also mindful of its prior decisions pertaining to the issue of excessive exemplary damage awards. The recent Nevada cases of *Ace Truck and Equipment Rentals, Inc. v.*

Kahn, 103 Nev. 503, 746 P.2d 132 (1987) and *Ainsworth v. Combined Insurance Co.*, 104 Nev. 587, 763 P.2d 673 (1988) were applied by the trial court, analyzed at length in both Petitioners' and Placer's briefs to the Nevada Supreme Court, and argued to the Nevada Supreme Court by Petitioners. Those cases hold that five factors should be considered in determining the amount of exemplary damages to be assessed:

1. the vulnerability of the injured party;
2. the financial position of the offending party;
3. the culpability and blameworthiness of the offending party;
4. the offensiveness of the punished conduct when compared to societal values of justice and propriety; and
5. the effect of the award as a means to deter future misconduct.

(a) Vulnerability of Placer was not an applicable criteria; nevertheless, Placer was vulnerable to serious financial consequences as a result of Petitioners' conduct.

As noted by the trial court, a careful review of *Ainsworth* shows that "plaintiff's vulnerability should be weighed when the offending party is in a superior financial position relative to the offended party, i.e., be viewed as an aggravating circumstance, not be viewed as a mitigating circumstance in a situation where, as here, the offended party is in a superior financial position relative to the offending party." Appendix B at B-41. Thus, it was not necessary to consider the vulnerability of Placer in this case because

such consideration would be used to increase the punishment, not to mitigate the award against Petitioners. *See also*, Appendix C at C-21 to C-22.

However, if Placer's vulnerability were at issue, Petitioners' argument is incorrect that Placer is not vulnerable because it allegedly had a net worth of $900 million. That net worth was very significantly affected by Petitioners' claims to all of the ore in the Bald Mountain Mine. Using Petitioners' numbers at page 4 of the Petition and a price of $400 per ounce for gold (the approximate price of gold during the years at issue), the value of the Bald Mountain Mine was $142,310,400 ($69,600,000 + [181,776 ozs. * $400 = $72,710,400]), or 16% of Placer's net worth. To claim that Placer was not "vulnerable" when faced with such a significant financial threat is to ignore reality. Had the trial court considered Placer's vulnerability, Petitioners' cause would not have been helped.

(b) Consideration of the Petitioners' respective financial positions was not necessary, particularly because they refused to provide discovery or testimony on their finances.

Consideration of the financial position of the offending party [Petitioners] is not necessary in the determination of the amount of exemplary damages. As noted in *Hotel Riviera Inc. v. Short*, 80 Nev 505, 396 P.2d 855 (1964), ". . . it is not essential to show the defendants' wealth in seeking exemplary damages." 80 Nev. at 520. *See also, El Rancho, Inc. v. First National Bank*, 406 F.2d 1205, 1218-1219 (9th Cir. 1968); *Clark v. Bunker*, 453 F.2d 1006, 1012 n.11 (9th Cir. 1972). In this case, the sole reason the financial condition of the Petitioners was not consid-

ered by the trial court was the refusal of the Petitioners to comply with discovery requests and orders on that subject as well as their failure to appear and be available to give testimony at the damage trial. The judicial system cannot be faulted for the intentional wrongdoing of the Petitioners. *See also*, Appendix C at C-18 to C-21.

In summary, the trial court's failure to consider the vulnerability of Placer or the respective financial positions of Petitioners was not error of a constitutional magnitude.

3. The Award Of Attorney Fees As Compensatory Damages Does Not Constitute An Award Of Exemplary Damages, Making The Exemplary Damages Excessive Under The Constitution.

Equally without merit is the Petitioners' argument that the award of approximately $162,000 in compensatory damages to Placer for the amount of attorney fees it had incurred to the date of the damage trial constitutes an award of exemplary damages. Nevada case law provides that attorney's fees may be awarded as compensatory damages if the fees are incurred in removing a cloud on title. *Day v. West Coast Holdings*, 101 Nev. 260, 699 P.2d 1067 (1985); *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982). In this case, the award was made to compensate Placer for the expenses it incurred in having to remove the cloud on its title to the Bald Mountain Mine imposed by the Petitioners. The award did nothing other than make Placer whole, and it did not provide a windfall to Placer. Petitioners have been ordered to do nothing more that compensate Placer for the damages they caused by their abusive and frivolous conduct. *cf., Chambers v. NASCO, Inc.*,

___ U.S. ___ , 111 S.Ct. 2123, 59 U.S.L.W. 4595 (No. 90-256; June 6, 1991). For the trial court to have done otherwise would send a signal to all persons committing a trespass that they would be free to do so without fear of paying for the damages they cause. There can be little doubt that the Nevada's judicial decisions in other cases were made to avoid such injustice. See, *Sun Realty v.District Court*, 91 Nev. 774, 542 P.2d 1072 (1975); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970). Again, Petitioners have not raised a constitutional issue.

C. Petitioners Have Received All Of The Constitutional Protection To Which They Are Entitled With Respect To The Exemplary Damage Award.

Petitioners complain that they have not received the "full panoply" of Nevada's procedural protection because "there was no trial on the question of liability, no jury or jury instruction, no post verdict hearing to insure meaningful and adequate review, and no evidence of application of standards by the appellate court to insure reasonableness". Petition at 10-11. This statement is patently false.

1. The Summary Judgment Motion Proceedings Constitute The Liability Trial.

The trial on the question of liability occurred through the filing and hearing of two motions for partial summary judgment and the granting of the second motion. Petitioners had the opportunity to present only minimal evidence to establish "a genuine issue of material fact" to prevent the entry of summary judgment. Petitioners failed to do so. Rule 55 of both the Federal and Nevada Rules of Civil Procedure authorize such "trials". Unless those rules are

declared unconstitutional by this Court, then Petitioners have not raised a viable constitutional issue for this Court's consideration.

2. The Petitioners Waived Their Right To A Jury Damage Trial By Failing To Appear At The Trial Where A Jury Venire Panel Was Waiting.

At the damage trial, there was a jury venire panel available from which a jury was to have been selected to determine whether exemplary damages should have been awarded against Petitioners. The Petitioners intentionally failed to appear for that trial and therefore waived the opportunity to have a jury consider whatever defenses they might have had to Placer's claims for exemplary damages. The judgment entered in this case was by a judge with more than two years' experience with the facts, law, pleadings and conduct of the parties in this case. Petitioners have not cited any judicial authority which provides that a judge is not competent to hear and consider evidence and render a judgment based thereon. Again, Petitioners have not raised a viable constitutional issue for this Court's consideration.

3. The Petitioners Received Constitutionally Adequate Review Of Their Claims.

Petitioners timely moved to amend the original judgment entered by the trial court. After the filing of briefs and lengthy consideration, the trial court partially granted the motion by reducing a portion of the punitive aspect of the judgment by more than $360,000. Appendices C and D. It belies the facts to state that the Petitioners were not provided with a post judgment hearing to insure meaningful and adequate review.

The Nevada Supreme Court, after reviewing the briefs of the parties as well as the Amended Judgment and hearing oral argument, unanimously found the Petitioners' claims to be without merit. Appendix A. Had the Petitioners desired a more lengthy opinion from the Nevada Supreme Court, they were free to request reconsideration of the court's order dismissing the appeal for lack of merit. Petitioners did not do so. This tactic, voluntarily chosen by Petitioners, should not now be allowed to be cited as evidence to support of Petitioners' allegations that they have not received adequate review. As with the preceding points, Petitioners have failed to raise a constitutional issue.

D. The Award Of Attorney's Fees And Costs As Compensatory Damages Was Not In Violation Of Nevada Case Law Or Statutes.

Petitioners state that the courts below awarded attorney's fees in violation of N.R.S. 18.010. No award of attorney's fees was made. As noted by the trial court and affirmed by the Nevada Supreme Court, attorney's fees and costs may be awarded as damages in slander of title actions. *Day v. West Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067 (1985); *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982). The Amended Judgment states that the award of the attorney's fees was an award of damages, not as an award of attorney's fees under N.R.S. 18.010. Appendix B at B-35.

Petitioners also state that the exemplary damage award in this action is in violation of an amendment to the Nevada Revised Statutes passed in 1988(*sic*). Actually, Nevada amended its exemplary damage statute in 1989, effective May 30, 1989. Statutes of Ne-

vada, Acts of 1989, Ch. 218. Although the original judgment was entered in this case on June 5, 1989, the *decision* awarding exemplary damages was entered on April 17, 1989. Section 4 of the statutory amendment provides "[t]he amendatory provisions of this act do not apply to any cause of action where the trier of fact has made a decision to award exemplary or punitive damages before the effective date [May 30, 1989]." Statutes of Nevada, Acts of 1989, Ch. 218, §4. As a result, this argument by Petitioners is not only wholly without merit, it is contrary to the very statute cited in support of their argument.

E. Sufficient Standards For Determining The Amount Of Exemplary Damages Exist Under Nevada Law To Make The Exemplary Damage Award In This Case Constitutionally Firm.

1. Nevada's Exemplary Damages Standards Were Adhered To In This Case.

Petitioners argue that the standards for determining the amount of exemplary damages, as established in *Ace Truck, supra.*, were not observed by the trial court. However, the trial court specifically cited and applied *Ace Truck* in the Amended Judgment. Appendix B at B-37 to B-39; Appendix C at C-18 to C-22. The affirmance of the Amended Judgment hardly supports Petitioner's claim that the Nevada Supreme Court did not consider its prior decisions. As noted by the trial court:

> "In *Ace Truck* the 'financial annihilation' rule, the 'shock the conscience rule', and the 'passion and prejudice' rules of appellate review of punitive damages awards are replaced with the following rule:

> 'Punitive damages are legally excessive when the amount of damages awarded is *clearly disproportionate* to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent, or malicious conduct of the tort feasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is *reasonably necessary and fairly deserved* in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.' (Emphasis added) *Id.* [*Ace Truck*, 103 Nev.] at 509.

"The Nevada Supreme Court then tells how a reviewing court may arrive at the ultimate judgment of where excessiveness begins:

> '[C]ourts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can properly be imposed in a given case. Relevant circumstances include such matters as *the financial position of the defendant*, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offending(*sic*)[4] party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which

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[4] Again, the re-print of the Amended Judgment in Appendix B is erroneous. The Amended Judgment, as well as the language from *Ace Truck*, reads "offended" party, not "offending" party.

> are judged necessary to deter future misconduct of this kind.' (Emphasis added) *Id.* at 510." Appendix B at B-37 to B-40.

After applying the applicable standards of *Ace Truck*, the trial court concluded:

> "In summary, this Court concludes that punitive damages in the amount of One Million Dollars ($1,000,000.00) should be awarded to Placer against the [Petitioners], jointly and severally. The court concludes that the [Petitioners'] conduct, under the facts present here, in "jumping" Placer's claims, was flagrant, malicious, oppressive and done with conscious disregard to Placer's property rights. When all of the facts were discovered, after substantial effort and expense to Placer, the [Petitioners] continued to assert frivolous and fraudulent defenses. These facts were known to the [Petitioners] or could have been discovered by the exercise of reasonable diligence as they were by Placer's agents and attorneys. After such facts having been exposed, this Court was not surprised by the [Petitioners'] failure to appear for trial. As a trial tactic, their absence at the trial may have been a calculated strategy since a jury may have awarded even greater punitive damages than this Court awarded, in view of the callousness of the [Petitioners]' conduct, the lack of any merit to their purported defenses, and their assertions of having performed assessment work when it would have been impossible for them to do so lawfully.

> Such defenses must be characterized as a sham or a fraud; a public trial would have exposed them as such. Under such circumstances, if any error occurred in the assessment of punitive damages, it may exist in the inadequacy of the punitive damages award in view of the callousness of the conduct of the [Petitioners] and some of their previous associates." Appendix B at B-41 to B-42.

In short, there is no room to argue that the trial court and the Nevada Supreme Court failed to apply reasonable standards to the determination of exemplary damages in this case. Certainly there is no evidence presented by the Petitioners supportive of their claim that the manner of determination of exemplary damages in this case was made in contravention to the due process requirements of the 14th Amendment to the United States Constitution or anything said or intimated in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

2. Nevada's Standards For Determining The Amount Of Exemplary Damages Provide Adequate Constitutional Protection.

The Petitioners argue that Nevada law does not comport with the due process requirements of the 14th Amendment because exemplary damage awards are not subject to reasonable standards of determination in Nevada. Petitioners cite only limited language from concurring opinions, but that language states that only "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process". *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 at 87-88 (1988, O'Con-

nor, J. concurring). The preceding discussion demonstrates that Nevada case law does not permit the "wholly standardless" award of exemplary damages, but rather requires the consideration of specific criteria in determining the amount of exemplary damages. See, Parts 3.b.2 and 3.c above. The ruling on Petitioners' motion to amend the judgment (Appendix C) and the Amended Judgment (Appendix B) demonstrate that the trial court was very careful to observe these criteria in the process of determining the exemplary damage award in this case. Petitioners attack on Nevada law as falling short of due process requirements is not supported by the very Nevada cases cited by Petitioners. Simply stated, this case does not provide this Court with either the facts or law which would allow a due process argument to prevail.

CONCLUSION

In their conclusion, Petitioners intimate that the trial court and Nevada Supreme Court gave "free reign to biases and prejudices", punished the Petitioners selectively, allowed other "guilty" parties to go unpunished, punished unpopular and targeted persons [Petitioners?], and awarded damages having no relationship to the actual harm caused. Petitioners have not provided one scintilla of evidence *in this case* that the trial court or the Nevada Supreme Court (1) acted with bias or prejudice against the Petitioners, (2) punished Petitioners in a manner differently from other defendants in the case below who conducted themselves as the Petitioners did, (3) allowed other defendants in this case to go unpunished for the same conduct carried out by the Petitioners, (4) especially

targeted the Petitioners for punishment [irrespective of the Petitioners' "popularity"], or (5) awarded damages having no relationship to the actual harm caused. Absent a showing ***in this case*** of the judicial misconduct as intimated by Petitioners, this Court cannot constitutionally consider the Petitioners' abstract pleas to do away with exemplary damages. United States Constitution, Article III, Section 2; *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Golden v. Zwickler*, 394 U.S. 103 (1969).

As noted in the foregoing sections of this Opposition, the Petitioners have not established any grounds of a constitutional nature which would warrant further consideration of this case by the Court. Accordingly, Placer respectfully requests an order from this Court denying the Petition for Writ of Certiorari. Additionally, because Placer asserts that the Petition is entirely frivolous, Placer respectfully requests an award of just damages against Petitioners and their attorney of record pursuant to the provisions of Rule 42.2 of the Supreme Court Rules.

Dated this 20th day of August, 1991.

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-174

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CENTENNIAL, A UTAH CORPORATION, JOHN A. DAHLSTROM AND ARNOLD C. WOOD, *Petitioners*,

v.

PLACER U.S., INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITIONERS' REPLY BRIEF

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No. 91-174

CENTENNIAL, A UTAH CORPORATION, JOHN A. DAHLSTROM AND ARNOLD C. WOOD, *Petitioners*,

v.

PLACER U.S., INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITIONERS' REPLY BRIEF

REPLY STATEMENT OF REASONS FOR GRANTING CENTENNIAL'S PETITION

I. The Factual Summary Contained in Respondent's Brief in Opposition is Inaccurate and Has Been Used Throughout the Proceedings as a Smoke Screen to Hide Real Defects in Placer's Title.

Throughout the proceedings in this case Respondent has continually referred to the disputed mining claims as if they were Fee Simple ownership in land where all questions of ownership had been resolved. This is simply not a fact. The paramount title to the surface and mineral rights involved in this case is held by the United States government. The competing claims of Petitioners were not the only clouds on these claims. This fact is indicated by the pleadings, which name 21 other defendants, and the trial court's ruling which devotes 21 pages to boundary line agreements. (B-26 through B-27; Exhibit A through C) Both the Petitioners and the Respondent have sought to appropriate these rights by complying with state and federal statutes. Respondent has taken possession and has continued in possession of the claims extracting substantial ore from them. Respondent has not been injured by any act of Petitioners and Petitioners have received no

benefit whatsoever from the claims. There was no evidence before the trial court that Respondent was prevented from selling or encumbering its interest due to the pendency of Petitioners' competing mining claim.

Throughout these proceedings and specifically in its brief in opposition, Respondent has used the tactic of name calling and character assassination to paint the Petitioners with a black hat and itself with a pure white hat. One example of this tactic is the attribution of all the alleged flaws in the Pioneer claims to Petitioners. While Petitioners do not agree that the claimed defects in the Pioneers are fatal to their claims, none of the problems with alleged defects in the Pioneer claims were created by Petitioners. Petitioners presented the Pioneer claims as they found them, warts and all. Nevertheless, Placer tries to use the record of facts regarding the Pioneer claims to paint Centennial as a malicious actor. In fact, aside from the alleged defects in the Pioneer claims, the state of the record at the time this case commenced includes numerous defects in Placer's title, which the trial court should have construed in favor of Petitioners on Placer's motion for summary judgment.

Examples of these defects in Placer's title are: (1) The Top claims filed in 1974 were never assigned a BLM number (the BLM numbers were apparently assigned to the amended Top Claims which were filed in 1979) (App. pgs. 183-188; R. Vol. XI, exhibit 9)); (2) Placer's own amended location certificates Top 1A through 4A have been declared invalid by the trial court (B-26); (3) Location certificates for the Top claims describe a completely different range from the range where the Bald Mountain mine is located. Placer's location certificates show them to be located in Range 53 E. whereas the Bald Mountain Mine is located in Range 57 E., more than twenty miles away. (App. pgs. 178-181; R. Vol. XI, exhibit 8); (4) Claims by Placer that work commenced on the mine prior to October 1985 when reports to shareholders show expenditures for work did not occur until after October 1, 1985 (R. Vol. II, pg. 289); and (5) There is no public record of the Top claims being transferred to Placer until after the litigation commenced. Placer relies on floating deeds which do not specifically identify any location. The deed of conveyance of the Top claims to Placer dated January 26, 1976 describes the property conveyed as follows: "All other mineral lands or deposits of minerals or interests therein which intervenes between the individual mining claims described in Exhibit A or are situated within five miles of the exterior boundaries of Polly 12." The Top claims are not specifically mentioned in the deed. (App. pgs. 202-205; R. Vol. II, pg. 473).

Each of these defects in Placer's title go to the question of the validity of Placer's title which was decided by Summary Judgment, and

had nothing to do with the Pioneer claims. To draw attention away from these facts, Placer has attempted to attribute alleged defects in the Pioneer claims to Petitioners.

There was no evidence before the trial court at the time it decided the question of liability in the second motion for summary judgment showing Petitioners acted with negligent, careless, malicious, or oppressive conduct. The evidence before the trial court showed that Petitioners had a legitimate dispute as to the ownership of the claim. The facts showed that Petitioners acquired the claim to Bald Mountain Mine and there was substantiated evidence that the acquired claim was valid. In fact, the title opinion of Placer's own counsel, which Placer furnished in its memorandum in support of its first motion for summary judgment, does not show the intervening claims that the trial court ultimately found defeated the Petitioners' title. The validity of Petitioners' dispute is also pointed out by the fact that the trial court itself denied Placer's first motion for summary judgment. In addition, Petitioners' obtained the advice of professor Schmid, a minerals law expert from the University of Utah Law School who stated that its claim had merit. There is no evidence, except self serving statements of Placer, that Petitioners acted in any way contrary to societal values of justice and propriety.

The minerals in question belong to the United States. The U.S. Congress and the Nevada legislature have prescribed the method by which these minerals can be appropriated. Petitioners had as much right to seek appropriation of these minerals as Placer did. Petitioners had numbers assigned to its claims by the Bureau of Land Management and gave notice just as Placer did. What is involved here is a legitimate difference of opinion as to title, which is common in the mining industry where competing unpatented claims are located on public domain.

Placer has used outrageous tactics which make conclusory allegations of misconduct by Petitioners as a smoke screen to direct attention away from the fact that its claim to a multimillion dollar mine is in doubt. The trial judge bought Placer's strategy to place a "black hat" on Petitioners resulting in an excessive punitive damage award. No trial was held on the question of liability. No jury heard the facts on damages, nor did the Nevada Supreme Court make a record of its review.

II. Attorney's Fees Were Awarded Contrary To Nevada Law

A. An Attorney's Fees Award is Improper Because They Are Not Provided For In A Rule, Statute or Contract.

In *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132, 138 n.4 (1987), the Nevada Supreme Court stated that it "has consistently held that absent a rule, statute or contract which authorized an award of attorney's fees, such fees may not be allowed." *Ace Truck*, 746 P.2d at 138 n.4 (citing *Lubritz v. Circus Circus Hotels, Inc.*, 101 Nev. 109, 693 P.2d 1261 (1985)). Because there was no contractual basis for the award of attorney's fees and it did not fall within any other rule or statute which would justify an award of attorney's fees, the court concluded that the award for attorney fees should be stricken from the judgment. *Ace Truck*, 746 P.2d at 138 (citing N.R.S. 18.010).

B. If Attorney's Fees Are Allowed, They Should Be Considered Punitive Damages

Even if this Court determines that attorney's fees should be awarded, they should be characterized as punitive damages not compensatory damages. The trial court did not award the attorney's fees under N.R.S. 18.010(2). The trial court said "of course, the attorney's fees here were not awarded under this statute, they are awarded as damages." B-35 (emphasis added). According to its reasoning on page B-35, the trial court could have used its discretion to award the attorney's fees under N.R.S. 18.010(2), but it decided instead to make the award under the rationale of *Summa Corporation v. Greenspun*, 98 Nev. 528, 655 P.2d 513 (1982). *Summa* involves a trust deed on Greenspun's land, which Summa Corp. refused to release even though the note it secured had been paid. The trial court in *Summa* made its determination based on extensive evidence of malice and bad faith by Howard Hughes, the sole shareholder of *Summa*, and certain of its directors. Based on this evidence the court found that attorney's fees and costs should be awarded to Greenspun. Both N.R.S. 18.010(2) and *Summa* constitute exceptions to the Nevada rule, which is the same as the American rule, which prohibits an award of attorney's fees to the prevailing party unless specifically provided for by contract or statute or a showing of bad faith.

Fee shifting of this nature constitutes punitive damages. Both the Nevada statute and the *Summa* case require a showing of bad faith, which creates an exception to the American rule and grants an award of attorney's fees to the prevailing party. Therefore, such an award is an exception to the general rule against fee shifting and constitutes punitive damages rather than compensatory damages as stated by the trial court. This Court has indicated that "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). This Court has further stated that "[t]he award of attorney's fees for bad faith serves the same purpose as a remedial fine imposed

for civil contempt," because "it vindicates the District Court's authority over a recalcitrant litigant." *Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S. Ct. 2123, 2137 (1991) (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)). In this respect, the fact "[t]hat the award has a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." *Id.* at 2137 (quoting *Hutto*, 437 U.S. at 691 n.17). Therefore, the attorney's fee award is punitive in nature.

III. If the Standards for Reviewing Punitive Damage Awards Outlined in *Ace Truck* do not Require Consideration of All Five Factors Listed, Then the *Ace Truck* Standards Violate the Due Process Standards Set Forth in *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991).

The Nevada Supreme Court in *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987) and again in *Ainsworth v. Combined Insurance Company of America*, 104 Nev. 587, 763 P.2d 673 (1988) list five factors to be considered when reviewing punitive damage awards. These factors are (1) the financial position of the defendant; (2) the culpability and blameworthiness of the tortfeasor; (3) the vulnerability and injury suffered by the offended party; (4) the offensiveness of the punished conduct when compared to societal norms of justice and propriety; and (5) the means judged necessary to deter future misconduct.

While it is unclear whether these factors alone are enough to satisfy the due process standards set forth in *Pacific Mutual*, neither the trial court nor the Nevada Supreme Court considered or applied each of these factors. The trial court and the Nevada Supreme Court did not consider the financial position of the defendant, nor did they consider the vulnerability and injury suffered by the offended party. Two of the five factors were not considered by the Nevada courts. This allows the Nevada courts to selectively choose which factors to consider and which to ignore. All of the factors are interrelated and should be considered when evaluating a punitive damage award.

A. The Nevada Supreme Court's Failure to Require Respondent to Show Evidence of Petitioners' Financial Condition Violated the Due Process Standards of *Pacific Mutual*.

There is no doubt that the trial court had no evidence before it as to the Petitioners' financial condition. The trial court stated: "In any event, the bankruptcy records were not relied upon in reaching the decision and judgment ultimately entered, and are not relied upon in

this amended judgment." *See* B-31. The trial court held that in Nevada "punitive damages may be awarded absent evidence of the wrongdoer's net worth as long as there is no evidence that the award will financially destroy the wrongdoer." B-40. As authority for this conclusion the trial court cites *Hotel Riviera Inc. v. Short*, 80 Nev. 505, 518, 396 P.2d 855, 863 (1964).

The *Hotel Riveria* case is distinguished from this one on its facts. The liability in that case was based on a conspiracy theory. Furthermore, it has been overruled by *Ace Truck* and its progeny which require specific elements be considered to determine the amount of a punitive damage award, including the financial condition of the defendant.

These more recent Nevada Supreme court decisions clearly indicate that evidence of defendants' financial condition is a factor that must be considered in determining the amount of a punitive damages award. *Ace Truck*, 746 P.2d at 132. In *Ace Truck* the court examined the financial position of the two defendants to find that the punitive damage award was excessive.

The trial court in the present case held that no evidence of Petitioners' financial condition was in evidence. When no such evidence exists no punitive award can be made because no determination of the effect of such award on the defendant is possible. *See Ace Truck*, 746 P.2d at 132.

In *Ainsworth v. Combined Insurance Company of America*, 104 Nev. 587, 763 P.2d 673 (1988), a decision subsequent to the *Ace Truck* case, the Nevada Supreme court clearly indicated "that the financial position of the defendant is still relevant to the determination of the amount of the punitive damages award." The *Ainsworth* court further stated: "The wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior." *Id*; *see Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 510 P.2d 876 (1973).

This question was recently addressed by the California Supreme Court *Adams v. Murakami*, No. S003530, slip op. (Cal. filed Aug. 15 1991). The California Supreme Court noted that the key question is whether the amount of damages exceeds the level necessary to properly punish and deter. The question cannot be answered in the abstract. A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition.

The most important question is whether the amount of a punitive damages award will have the desired effect--without being excessive. Even if an award is entirely reasonable in light of the other factors in *Ace Truck*, the award can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone. The determination of whether an award is excessive is admittedly more art than science. When provided with evidence of a defendant's financial condition, however, the reviewing court can at least reach a reasonably informed decision. Without such evidence, it can only speculate as to whether the award is appropriate or excessive.

The Respondent makes no attempt to justify the trial court's discarding the Petitioners' financial condition from the analysis, they simply state the bare conclusion that trial court need only consider conclusory assertions as to Petitioners' actions. Any analysis of punitive damages that does not take into account the financial position of the defendant, will not enable a reviewing court to make an informed determination of whether an award is excessive, and sound public policy should preclude awards based on speculation. Compensatory damages cannot be based on speculation, and the rule should not be any different for punitive damages.

In upholding the award at issue in *Pacific Mutual Life Insurance Co. v. Haslip*, ____ U.S ____, 111 S.Ct. 1032 (1991), this Court noted the state's "post-trial procedures for scrutinizing punitive damages." The factors deemed appropriate for the trial court to consider included "the impact upon the parties." Obviously, this factor would encompass consideration of the defendant's financial condition.

The California Supreme court in analyzing *Pacific Mutual* placed great importance on the fact that the Supreme Court emphasized the "detailed substantive standards" the Alabama Supreme Court used in evaluating punitive awards on appeal. The California court noted that the Alabama court had made clear that the defendant's financial condition is "a consideration essential to a post-judgment critique of a punitive damages award."

The California Supreme Court went on to point out, if the plaintiff does not introduce evidence of the defendant's finances, the only alternative source of information is the defendant, and it is inherently prejudicial to require him to submit such evidence. It places him in the position of bidding against himself by suggesting to the jury that the he is admitting punitive damages should be assessed. Therefore, the California Supreme court held that burden of producing such evidence is properly placed upon the plaintiff.

Evidence of Petitioners' financial condition in the present case is essential to determine the amount of the punitive damages award when such evidence is absent the award must be reversed or remanded.

B. The Nevada Supreme Court Violated the Standards Set Forth in *Pacific Mutual* by Not Requiring the Trial Court to Consider the Substantial Wealth of the Plaintiff [Respondent].

Evidence of the plaintiff's financial condition was introduced but was ignored by the trial and appellate courts. The evidence shows that the plaintiff was not vulnerable to the actions of defendant, whatever they may have been, where the maximum actual damages were $12,000. Plaintiff is an extremely wealthy, multinational corporation. Placer's 10K report for calendar year 1988 filed with the U.S. Securities Exchange Commission, (R. Vol. II, pg 276), shows that Placer's Financial Condition as of December 31, 1988 was as follows: Gross Assets $2,611,700,000 Net Assets $1,896,500,000 Gross Earnings $788,100,000, Net Earnings $262,400,000, Net Worth $700,000,000. Placer's claim on pages 13 and 14 of its brief in opposition that Placer was vulnerable is without merit. The effect of the punitive damage award on Placer is to reward a wealthy plaintiff that was not vulnerable to the actions of Petitioner. The financial condition of Placer should have been considered under the five factor test of *Ace Truck*, but was not. The Nevada Supreme Court endorsed this action by affirming the trial court's decision without comment. This action violates the standards of due process set forth in *Pacific Mutual*.

IV. The Trial Court Should Have Applied N.R.S. Section 42.05 To Limit Punitive Damages.

Respondent claims that N.R.S. 42.005 does not apply because the effective date of the amendment imposing limitations on punitive damage awards was May 30, 1989. The original judgment was entered on June 5, 1989, after the effective date of the amendment. *See* appendix D-27. The Respondent claims that the amendment did not apply on April 17, 1989, the date the hearing was held. We disagree. Not only was the judgment entered on June 5, 1989 after the date of the amendment, but the original decision was reconsidered and substantially amended after the effective date of the amendment on October 16, 1989 and again on December 22, 1989. *See* appendix B and C. The nature of these amendments dealt specifically with the punitive damages portion of the original decision. Therefore, the "trier of fact's decision" was made after the effective date of the act and the statute was applicable and should have been considered.

V. The Trial Court's Refusal to Continue the Trial on Damages Violated Petitioners' Due Process Rights.

Petitioners made timely motions for a continuance and to strike the damages trial setting because they could not obtain new counsel. This motion was supported by an affidavit and copies of letters to counsel. (R. Vol II 374-377) For Petitioners to obtain counsel it was necessary for prospective counsel to review transcripts of prior proceedings. Rule 11[1] of the Nevada Rules of Civil Procedure requires counsel to be familiar with all prior proceedings.

Despite requests and advance payment for transcripts from the trial court, the transcripts were not completed before trial due to the press of other court business. The trial was held April 17, 1989 and the transcript of the hearing on the second motion for summary judgment was not completed until June 5, 1989.

VI. Respondent Has Not Countered Several Arguments Made In Petitioners' Petition.

Petitioners have made arguments and cited cases in thier petition on pages 9 to 25 that support the following conclusions: (1) Nevada law as applied in this case fails to meet the constitutional standard required by *Pacific Mutual* and, therefore, violates the fourteenth amendment; (2) Nevada law for imposing and reviewing punitive damage awards violates due process; (3) The amount of the punitive damages award in this case was excessive; (4) The suit below must be considered criminal in nature as to the punitive damages award therein, which entitles Centennial to protection under the

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[1]Rule 11 states in part:

> The signature of an attorney or party constitutes a certificate by that attorney to or party that he or she has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief, formed after ***reasonable inquiry*** under the circumstances obtaining at the time of signature, that it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee. Nev. R. Civ. Pro. Rule 11 (emphasis added).

fourteenth amendment. The punitive damages imposed against Petitioners fall within the controlling test established by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and the Nevada law for imposing punitive damages meet the *Kennedy* test. The fact that punitive damages are sought by private plaintiff's rather than the government does not prevent the penalty from being deemed criminal in nature; and (5) The constitutional defects in the award of punitive damages against Petitioners in this case were not cured by judicial review or the potential for a remittitur.

Nothing in the Respondent's brief negates any of these arguments.

CONCLUSION

The Punitive damages awarded in this case are excessive and were awarded without proper consideration of Nevada State statutes and case law, and without the full panoply of the due process protections required by the fourteenth amendment. *See Pacific Mutual*, 111 S. Ct. at 1032. The determination by the Nevada trial court and the Nevada Supreme Court should be reversed and remanded because: (1) The punitive damage award in this case is clearly excessive. The ratio of punitive damages to compensatory damages is 83 to 1 if attorney's fees are denied. If attorney's fees are awarded and properly characterized as punitive damages, the ratio is 98 to 1; (2) The combination of a summary judgment determination of liability and a failure by the trial and appellate courts to consider applicable statutory and case law standards violates due process and requires that this case be reversed and remanded for a determination consistent with *Pacific Mutual*; and (3) If the Nevada Supreme Court's interpretation of *Ace Truck* is correct, and less than all five of the factors listed may be considered in reviewing punitive damages cases, the *Ace Truck* analysis violates the due process clause by failing to require consideration of the factors listed in *Pacific Mutual.*

Dated September 12, 1991.

Respectfully submitted,

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